91-04455/

REPORT

OF THE NOVA SCOTIA

COURT STRUCTURE TASK FORCE

March 1991

COURT STRUCTURE TASK FORCE:

William H. Charles, Q.C. (Chair)
Leonard Kitz, Q.C., D.C.L. (Vice-Chair)
Harry Wrathall, Q.C.
Robert Huestis, Q.C.
Daniel N. Paul
Clyde MacDonald*
David Gruchy, Q.C.*
Nancy Bateman*
Peter Ross*
Albert Bremner, Q.C.
Theresa Forgeron
Martha Crowe
Douglas J. Keefe

Family Law Subcommittee:

Martha Crowe (Co-chair)
Nancy Bateman* (Co-chair)
Douglas C. Campbell
Rollie Thompson
Judge James Williams
Terry Yeadon

Criminal Law Subcommittee:

Martin Herschorn, Q.C. (Chair)
Judge Hiram Carver
Marc Chisholm
Joel Pink, Q.C.
Duncan Beveridge
Albert Bremner
William Digby
William H. Charles

* Resigned upon appointment to the Bench and did not participate in the final deliberations of the Task Force or the preparation of this Report.

ISBN 0-88871-192-1
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Cover Illustration by J. Spurway.

NOVA SCOTIA COURT STRUCTURE

TASK FORCE REPORT

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NOVA SCOTIA
COURT STRUCTURE TASK FORCE

William Charles, Q.C.
Leonard Kitz, Q.C., D.C.L.
Harry Wrathall, Q.C.
Robert S. Huestis, Q.C.
Daniel Paul

Albert E. Bremner, Q. C.
Martha Crowe
Douglas J. Keefe
Theresa M. Forgeron

P. O. Box 7
Halifax, Nova Scotia
B3J 2L6

Phone No.: 424-4025
Fax No.: 424-4556

Our File: 08-90-0008-00

March 11, 1991

The Honourable Joel R. Matheson, Q. C.
Attorney General
10th Floor, Bank of Montreal Building
HALIFAX, Nova Scotia

Dear Mr. Matheson:

The Nova Scotia Court Structure Task Force has been at work for over a year, endeavouring to carry out the mandate with which we were charged. During that period the Task Force has met continuously every two weeks from January, 1990 until August, 1990 and weekly since that time. Background material has been collected and reviewed, the views of the judiciary, the bar, court administrators and the public have been sought and received. Much time has been spent discussing important and controversial issues and we have had to adapt to the consequences of having four of our members appointed to the bench, two of whom were replaced. We are pleased to submit to you the unanimous report of the Task Force.

In the course of arriving at our recommendations, we consulted widely with court and administrative officials in other jurisdictions where court structure reform has either been achieved or proposed. In this regard, our consultations have involved meetings with officials and members of the judiciary in Manitoba, British Columbia, Ontario and New Brunswick. In Nova Scotia, we obtained the views of the judiciary and members of the bar by way of discussions, presentations and questionnaires. Your Chairman visited many court registries in the province to get the views of court clerks and prothonotaries. Public participation was solicited via media notices, questionnaires sent to roughly 230 community agencies, and nine public hearings at various sites around the province.

All members of the Task Force have been impressed by the quality of the submissions made to us and by the dedication and concern of those who made the effort to make their views known. Their input was very important and useful and we learned a great deal about many aspects of the justice system from these participants.

It became clear to us at an early stage of our investigation that there are significant concerns and frustrations with the existing court system, particularly in the area of family law. It became equally clear that anecdotal evidence predominated over hard factual data.

The problems brought to our attention were real enough, but the causes and most appropriate solutions were not always readily apparent. Much of our time was spent trying to understand the problems and then to reach agreement upon the best solutions. But, in spite of specific shortcomings in the court system, it seems to be working reasonably well in spite of itself. We do not mean to suggest that improvements cannot and should not be made. Far from it, but we do not see evidence of a system on the verge of imminent collapse either. We should point out, however, that time constraints did not permit us to review and assess the operation of the many administrative tribunals and agencies which currently constitute a major part of our legal system.

We have tried to make recommendations that build on the strengths of the court system and provide a blueprint for the development of effective, high quality justice services.

Yours sincerely,

WH Charles

William H. Charles, Q. C.
Chairman

WHC/gmb

Albert E. Bremner, Q. C.

Douglas J. Keefe

Martha Crowe

Leonard Kitz, Q. C., D. C. L.

Theresa M. Forgeron

Daniel Paul

Robert S. Huestis, Q. C.

Harry Wrathall, Q. C.

COURT STRUCTURE TASK FORCE

TERMS OF REFERENCE

1. The mandate of the Task Force shall be:

(a) to review the present structure and procedures of the courts;

(b) in particular, to examine:

- merger of the Supreme and County Courts,
- a unified family court,
- procedures before the courts,
- role of Chief Justices and Chief Judges in the management and administration of courts at all levels,
- role and operation of the Judicial Councils in the Provincial Court and the Family Court,
- delivery of court services outside the major population centres of the Province,
- enforcement of court orders,
- enforcement of municipal bylaws and small claims matters,
- traffic courts,
- judicial case management,
- automation of court administration,
- the appropriate role of masters, registrars, assessors and referees,
- alternative dispute resolution and the use of referees, mediators, arbitrators and specialized tribunals,
- the jurisdiction, structure, organization, sittings, case scheduling and workload of the courts of Nova Scotia, and
- such other matters as the Attorney General may from time to time refer to the Task Force.

(c) to report and make recommendations to the Lieutenant Governor in Council in respect of matters referred to in clauses (a) and (b) that will:

- eliminate unnecessary delays and unduly technical litigation issues,
- enhance access to justice for the people of Nova Scotia through simple, efficient and expeditious dispute resolution systems.

2. The Task Force shall be requested to report in two stages:

   (a) an interim report regarding the merger of the Supreme Court Trial Division and the County Court not later than April 6, 1990;

   (b) a final report not later than November 30, 1990.

3. The Task Force shall be authorized to conduct between five and seven public meetings throughout the Province and invite written submissions from interested persons.

4. The Task Force shall be supported by a small secretariat.

90/01/03

3. ACKNOWLEDGEMENTS

On behalf of the Task Force I would like to extend our heartfelt gratitude to the members of our subcommittees who responded so effectively to our call for help and in particular, to those who chaired the committees. The issues dealt with by our subcommittees constituted most important items on our agenda.

My personal gratitude is extended to Ms. Glenys Bruce, recording secretary to the Task Force, who, with unfailing good humour and patience, listened to and recorded our deliberations and typed our many draft reports. As the sole member of the secretariat, her efforts were absolutely essential.

To all those who assisted us by making submissions, providing information or answering questionnaires, we extend our sincere appreciation.

Lastly, to all those who served as members of the Task Force and who persevered in good humour while doing other demanding jobs, my deepest gratitude.

William H. Charles, Q. C.
Chairman

4. INTRODUCTION

4.1 Organizing

The Nova Scotia Court Structure Task Force began its work in January, 1990. The first month or so was devoted to collecting background material, organizing subcommittees and becoming familiar with the scope of our extensive terms of reference. A schedule of regular meetings was agreed to, which resulted in the Task Force meeting every two weeks until the end of August and then weekly thereafter. Discussion papers were prepared by the Chairman and subcommittees for presentation to the Task Force as a whole. Subcommittees were created to research and report upon proposals for a unified family court, a unified criminal court and provincial judicial councils. The unified family court subcommittee was chaired by Ms. Martha Crowe and Ms. Nancy Bateman (now Judge Bateman). The unified criminal court subcommittee was chaired by Mr. Martin Herschorn while the judicial council subcommittee was directed by Mr. Bob Huestis.

4.2 Consultations

In February, the Chairman consulted officials of the Attorney General's office in Manitoba, a province where merger of the County Court and the Courts of

Queen's Bench had already taken place, and with Mr. Ted Hughes, Chairman of the British Columbia Justice Reform Committee. The Hughes Report,[1] written in 1988, has been the subject of considerable discussion. Discussions with Mr. Hughes and other members of the Attorney General's office in British Columbia provided much needed help at an early stage of our deliberations.

Meetings were held with the Honourable Mr. Justice T. G. Zuber, author of the Report of the Ontario Courts Inquiry,[2] former Justice of the Supreme Court of Canada Willard T. Estey, the Honourable Jim Lockyer, Attorney General for New Brunswick, and members of his staff, and the Honourable Chief Justice of New Brunswick, Stuart Stratton. All of these individuals gave unselfishly of their time and provided insights and advice that were most appreciated.

The entire Task Force met with Attorneys General Ian Scott of Ontario and Jim Lockyer of New Brunswick in April to discuss the concept of a unified criminal court and court restructuring in general.

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[1] *Access to Justice: The Report of The Justice Reform Committee (1988).*

[2] *Published by the Ontario Ministry of Attorney General (Queen's Printer) 1987.*

4.3 Composition

Work of the Task Force was disrupted to some extent by the appointment of four members of the Task Force to the bench during the first six months of our operations. We were fortunate to add Theresa Forgeron and Albert Bremner as replacements. Their willingness to step in rather late in our deliberations and do the necessary work to bring themselves up to speed in terms of background knowledge and grasp of the relevant issues speaks highly of their commitment to the enterprise. Their presence strengthened our criminal law experience and maintained the family law knowledge.

The Task Force benefited greatly from the diversity of experience its members brought to the task. Of the original eleven members, one is a law professor (Chairman), seven are lawyers in private practice at various places throughout the province, two are government lawyers and one is a lay person. All brought their own individual perspectives and experience to bear on the issues discussed involving civil litigation, family law and, to a lesser extent, criminal law.

4.4 Submissions

The Task Force benefited greatly from the reports on court restructuring previously prepared by Mr. Hughes and the Honourable Mr. Justice Zuber.

However, we were aware that conditions in other provinces are not necessarily duplicated in Nova Scotia and that recommendations, appropriate as they might be for another jurisdiction, would not necessarily apply here. We therefore took steps to obtain as wide a spectrum of local views as we could.

Efforts were made via media announcements and questionnaires to obtain the views of and submissions from members of the judiciary, the bar and the public. We received written and oral submissions from judges and judges' associations, and from lawyers and lawyers' associations. The Nova Scotia Barristers' Society made a submission to the Task Force concerning the structure and operation of provincial judicial councils. The Canadian Bar Association (Nova Scotia Branch) submitted a written brief and made an oral presentation to us as did the various county bar associations.

Approximately 230 community agencies were asked to complete a questionnaire developed by the Public Legal Education Society of Nova Scotia[3] at our request. Although the response rate was not high (only 27%), it was sufficient to enable certain general observations to be made. Public hearings were held at nine different locations around the province. Although the turnout at these meetings was disappointing, it is understandable perhaps, in light of the technical nature of the subject matter.

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[3] *Survey of Community Concerns, Report to the Nova Scotia Court Structure Task Force, September 10, 1990. See Appendix 2 for an executive summary of the report.*

4.5 Interviews

The Chairman visited many of the Supreme and County Court registries in the Province and interviewed prothonotaries and chief clerks. Persons interviewed were candid in their opinions and gave generously of their time. Their experience added a valuable perspective.

4.6 Research

Task Force members spent many hours reading background material, listening to presentations made by interested groups and individuals, and debating controversial issues. Much of the evidence presented was anecdotal and hard factual evidence was difficult to obtain. We tried to redress this need to some extent. Ms. Amy Parker, who served as a summer research student, generated data in relation to the monetary amounts at issue in civil actions commenced in the Supreme and County Courts.[4] Ms. Parker also collected and assessed background data which ultimately constituted the basis for several discussion papers.

We also appreciate the statistical information provided by Ms. Gretchen Pohlkamp, Coordinator of Supreme and County Courts, with the kind permission of Chief Justice Glube. Chief Judge Ian Palmeter went out of his way to arrange the collection of County Court case statistics and Mr. Jock MacKinnon of the Department of Community Services very kindly provided Family Court data. In the Attorney General's Department, Mr. Alden Rennie, Director of Court Support Services, assisted greatly with information about the functioning of the courts - in particular, statistical data about cases in our Provincial Court. Mr. Bud MacDonald, Manager of Information Systems, provided useful advice and comment regarding the current state of technological development within the judicial system.

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[4] *See Appendix 3.*

The fact that we had to rely upon the good will of these individuals to provide us with the barest of statistical data highlights the urgent need for a process to collect and analyse court data. Unfortunately, it might be said quite accurately that we have been long on speculation and short on data in this inquiry.

In spite of this shortcoming, members of the Task Force are reasonably confident that we have an accurate understanding of the present court system and its strengths and weaknesses. We believe that our recommendations, if implemented by government in cooperation with the bench, bar and administrators, will correct the shortcomings in the court system and build on existing strengths to produce effective, high quality justice services.

5. COURT RESTRUCTURING:
GENERAL CONSIDERATIONS

5.1 Values

We have been guided in our approach to the task of court restructuring by the following values:

The court structure should:

(a) be suited to conditions in Nova Scotia;

(b) be rational, with divisions of function or jurisdiction based upon purposes or goals rather than accident or history;

(c) be as simple and flexible as possible;

(d) be comprehensible to the public;

(e) serve public needs rather than the needs or convenience of the people in the system;

(f) provide accessibility to the courts by all members of society, irrespective of their means or station in life;

(g) determine disputes with reasonable speed;

(h) be affordable for both litigants and society;

(i) inspire public confidence in the competence of decision makers;

(j) provide a uniform and consistently high standard of operation;

(k) avoid, to the extent possible, the perception of different classes of justice meted out by different levels of court.

Some of these considerations may seem so basic and obvious that they need not be specifically stated. It was our experience, however, that we needed to be reminded of them periodically as we discussed specific issues of court restructuring. Because of their importance, some of these considerations deserve and require further elaboration.

5.2 What are Courts?

Surprisingly, there does not seem to be a single widely accepted definition of what we call a court. According to one well respected English legal authority, the term "court" has come to mean "The place where justice is administered".[5] It can also be used to mean "The persons who exercise judicial functions under authority derived either directly or indirectly from the sovereign".[6] But whether court means a physical location, an institution or the persons who exercise judicial functions, the court system occupies an important place in our society.

Courts have been given the authority to decide matters that are litigated before them and they employ a particular procedure in doing so. Courts settle disputes between individual citizens and between citizens and the state. Disputes between individuals may arise when the entitlement to a right or the value or legitimacy of a claim is not immediately self evident. Sometimes the dispute is not about the law but about the facts of a particular situation, while in other instances, parties are uncertain as to their legal relations with another person or the state.

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[5] *Halsbury's Laws of England (4th ed., Vol. 10, para. 701).*

[6] *Quoted in the Preliminary Study Concerning the Administration of Civil Justice in Victoria, Civil Justice Committee (1984) (Australia).*

A trial in a court is an institutionalized way of resolving disputes or differences that the parties themselves are unable to resolve. It is therefore very important that the court command the respect of the litigants and the community.

There are important characteristics of courts and the adjudicative dispute settlement process that we need to keep in mind when addressing the question of court restructuring. We need to remember that we assume an impartial decider or judge who will act more like a referee than an investigator and who may, in the process of determining facts and rendering a decision, make new law. The proceedings are public but the trial is preceded by a period of time during which the lawyer controls the pace of proceedings and during which there are procedural rules to be followed that are designed to promote settlement prior to trial. Part of this opportunity for settlement involves building into the process some reasonable time for the parties to consider their relative positions and to negotiate a settlement. If this is not successful and the matter has to be decided by a judge in court, the decision is final and subject to appeal on limited grounds.

5.3 Fundamentals

We also need to be aware that there are certain principles that theoretically underlie the administration of justice as we know it. They include:

(a) a judiciary that is independent and impartial;

(b) a judiciary that is competent and which assures an adjudicative process of high quality;

(c) a court system and legal system in which the public has confidence;

(d) a court system that is efficient in the functions it performs and the manner in which it is administered;

(e) a system that is accessible in every sense of the word to those who wish to use it.

The courts must respond to social change while endeavouring to remain true to their fundamental principles. Internal adjustments will be required from time to time but through it all courts must be guided by some sense of their essential functions and characteristics. For, in addition to settling disputes with finality in a way that does justice for the parties, our courts are an important social institution, making law and protecting citizens from despotism.

5.4 Public Opinion

According to several recent surveys, there is clear public concern with the complexity, slowness and cost of our justice system. This is probably accentuated by the fact that a significant portion of the public does not think it has an adequate understanding of the legal system as a whole and the structure of our courts in particular. Delays in getting legal disputes resolved mean extra costs for the litigants and for the public. These public concerns have been documented in a survey for the federal Justice Department,[7] as well as other public opinion research polls.[8]

In the Department of Justice study, three quarters of the respondents believed that the law favoured the rich. This same sentiment was echoed in the Manitoba study as well as the comment that "it takes too long to get anything done through the legal process". In the Bogart and Vidmar Study there was strong support for the proposition that every effort should be made to resolve disputes without engaging in court proceedings (p. 70).

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[7] *This survey was done by Economics Research Group - Limited Survey of Public Attitudes Towards Justice Issues in Canada, (June, 1987).*

[8] *Such as those conducted by the Legal Research Institute of the Manitoba Faculty of Law (Moore, Reflections of Canadians on the Law and the Legal System - Legal Research Institute, Survey of Respondents in Montreal, Toronto and Winnipeg in Gibson & Baldwin (eds.) Law in a Cynical Society), Opinion and Law in the 1980's (1983), and by Bogart & Vidmar for the Conference on Access to Civil Justice of the Ontario Ministry of Attorney General, June, 1988.*

In Nova Scotia, many community groups complained about the length of legal proceedings and the resulting financial and emotional cost.[9] These same groups also cited the need for more information about the legal system.

But, in spite of concern with cost, delay and complexity, members of the public continue to have faith in the legal system as a whole and think that it should be supported with tax dollars. Respondents to the Justice Department Study overwhelmingly agreed (96%) it was critical to maintain a good justice system and a good use of public money when compared with other types of government expenditures. The Access to Justice Survey by Bogart and Vidmar supported this view but not as emphatically. In Nova Scotia, respondents to the survey, conducted by the Public Legal Education Society of Nova Scotia for the Task Force, also supported the justice system and expressed the need to commit greater financial resources to the legal system.

Thus it seems although there are many complaints about the justice system and the prevailing tone is one of cynicism, there is an underlying reservoir of faith in the justice system even as it is organized. If this residual public confidence in the legal system is to be maintained and enhanced, steps will have to be taken to address public concerns of cost, delay and complexity.

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[9] *Documented in the survey by the Public Legal Education Society of Nova Scotia. See Executive Summary Appendix 2.*

5.5 Trends in Court Reform in Canada

A review of attempts to address these concerns in Canada shows that judicial reform has concentrated upon court restructuring in the form of trial court consolidation beginning with Prince Edward Island in 1975.[10] One Canadian commentator has observed that such structural changes have been regarded as the key to judicial reform.[11] Why should this be so? Several answers can be suggested. Simplification should present a structure that is less intimidating in its complexity and thereby remove psychological barriers to accessibility. Simplification of court structure should improve administrative efficiency by permitting integration of procedures and resources.

The major thrusts of court reform in Canada are: merger of the County and Supreme Courts (both of which are trial level courts); creation of unified family courts (some as pilot projects); and proposals for a unified criminal court and a single trial court of combined civil, criminal and family jurisdiction. Unification of Supreme and County Courts involves vertical integration on a broad subject matter scale while the concept of a unified family court involves merging the jurisdictional authority of several different courts with regard to the same subject matter.

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[10] *The MacKimmie Report (1973) by R. A. MacKimmie, Q. C., "Constitution of the Courts in P. E. I."*

[11] *Carl Baar, "Courts and Constitutions: The Institutional Setting of Judicial Administration", paper presented at Conference of Judicial Administration, State University of New York at Albany, June 17, 1986. Quoted in Russell, P. H., The Judiciary in Canada: The Third Branch of Government, 1987 at p. 269.*

Canadian initiatives have concentrated upon three aspects of court structure and administrative reform: (1) reducing the number of levels of courts by merger; (2) unifying and consolidating court administration; and (3) creating specialized tribunals that are competent in specific areas like family law and criminal law. All other provinces in Canada (apart from Nova Scotia) have merged their Supreme and County or District Courts while several have established unified family courts as either pilot projects or as a permanent part of the court structure.

5.6 Types of Courts

When considering restructuring and management of existing courts, it is important to keep in mind that there are different types of adjudicative functions performed by different types of courts. In one type, best exemplified by the traditional superior court, litigation is carried on with legal formality in the sense of established rules of procedure, extensive fact finding and careful deliberation. The volume of cases handled is modest compared with other trial courts.

A second type of court, such as our Provincial Court, is characterized by a large volume of cases where expeditious fact finding and law application is emphasized.

A third type of court, referred to by some as therapeutic, tries to adopt a holistic approach to the dispute before it by taking account of both legally and non-legally relevant factors in an attempt to identify the problems that are the source of the dispute. The court then explores and requires actions designed to resolve those problems while protecting the persons before the court as well as the interests of society. The Family Court with its use of social services such as counselling, mediation and conciliation is an example of this type.

Identification of a court as a particular type is important because each type has different strengths and weaknesses. Each emphasizes different values.

5.7 Delay

One of the troublesome problems associated with any discussion of delay in the court system is the fact that we lack an agreed terminology. When the term is used, it generally means unreasonable and unwarranted delay, but even this concept is open to different interpretations. As we have already noted, the normal court process allows time for the parties to refine the issues and to negotiate. Some delay is desirable in most cases and is built into the system.

When does delay become unwarranted? From what point in time should we measure delay? Most courts statistics measure the time from the moment the action is commenced or set down for trial. This is a far shorter time span than from the client's perspective. From a client's point of view, delay in getting a dispute resolved is measured from the time the matter is taken to a lawyer until a final decision is rendered by a judge. This interval consists of a number of factors, including: (1) the time required by the lawyer to prepare the case for trial; (2) the actual extent of any court congestion or backlog; (3) the number of postponements or adjournments requested and granted; and (4) the time required for the trial and to write a judgment if the judge reserves decision.

Other points about the delay problem should be considered as well. Statistical information is often lacking or inadequate and, when it is available, may not reflect the complicated nature of delay problems encountered by the courts. What is needed are sophisticated performance indicators. We should be careful not to use rather simple and crude measures such as the number of cases commenced and the number set down for trial as the basis for fixing blame for delay.

There is also the important question of the proper role of the court in seeking to manage and control delays. To what extent should the judge become actively engaged in promoting settlements or moving a case along towards final judgment? Steps have been taken to reduce court congestion and delay by the implementation of a variety of procedural devices intended to speed up the process. These include requiring full disclosure of evidence, expanded discovery procedures, pre-trial settlement conferences, and the elimination of unnecessary interlocutory motions. Other measures involving caseflow management by the judiciary, stricter control of adjournments, more effective control of court calendars and judges' time as well as increased use of technology have also been utilized to reduce delay.

Besides trying to streamline the procedures that govern litigation, delay problems have been attacked by trying to reduce the number of cases that have to be heard by a court. This is done by diverting cases to other dispute resolution agencies or mechanisms, many of which are designed to provide cheaper and quicker processes for resolving disputes. Whether this should be done at all, whether the diversion should be mandatory or optional and for what kind of cases, are important questions that deserve careful consideration.

A favoured approach stresses the need to increase the capacity of the courts by providing funds for additional judges, support personnel and physical facilities. Presumably this approach should only be adopted after other methods have been tried and found insufficient to reduce delay to an acceptable level. It is clear that some aspects of delay are beyond the control of the courts and depend upon lawyers being prompt and effective in their organization and carrying of a case.

Whichever of these approaches is used, we must always keep their effect upon other factors, like accessibility, judicial independence, quality of justice and public confidence, in mind.

5.8 Efficiency and Accessibility

Because court restructuring has, as an important part of its objective, the reduction of delay and the lowering of cost, the emphasis will tend to be upon efficiency. While efficient use of court facilities and personnel should reduce delay in the system and lower operating costs, we must remember that efficiency is just one factor to be considered. It must be balanced against other factors like accessibility, the quality of the adjudicative process, judicial independence and public confidence. In many situations, efficiency as a goal will complement these other factors, but in some circumstances, a little inefficiency in the form of delay may be necessary in order to ensure a just result. Conversely, in our attempts to reduce delay and costs in the system, we may be inclined to limit access to the courts for some kind of disputes which, in our best judgment, can be more effectively dealt with by a non-judicial body or official.

These considerations suggest that there may be a fundamental question which should be addressed before any attempt is made to restructure our courts. The question can be put in different ways. One way is to ask whether there is a socially acceptable level of litigation within our society and if so, what is it and who decides? Another way of approaching the same issue is to ask whether all disputes have to be heard by a judge in a court or, more specifically, by a superior court judge. Are there some kinds of disputes that should not be heard by a court because they are not appropriate for reasons of justiciability, importance, or cost? Since the advent of the Charter, we litigate public policy questions that were formerly the province of the political process. Are the courts well suited to these public policy questions? Such questions raise the particular issue of accessibility but in relation to process and subject matter rather than individuals.

Access to the court system for individuals can be made easier by providing adequate legal aid so that financial accessibility is promoted. Reducing legal costs can also help. Accessibility can be enlarged by procedural rules allowing class actions and by liberalizing rules of standing. It can be expanded for some and restricted for others by requiring some cases, or parts of them, to be heard by non-judicial officers or agencies.

We do not attempt to answer these questions. They defy pat answers and when answers seem to present themselves they conflict with answers to other questions. For example, if we increase geographic access by bringing the courts to every village, the judges spend more time in their cars and less in their courts, so you may not travel far for a judge but you may wait longer. The price of geographic access is delay in that case.

However, though we don't offer answers to these fundamental questions, we considered them as we deliberated. We assigned greater or lesser values to them as we formulated our recommendations. We did this intuitively and probably not always consciously. Sometimes we were able to articulate the value judgements we made and sometimes we weren't. Nonetheless they underlie all our work.

6. THE PRESENT COURT STRUCTURE IN NOVA SCOTIA: AN OVERVIEW

6.1 Overview

Nova Scotia has eight different courts. The Supreme Court and County Court are administered by the Province but the judges are federally appointed and paid. The Probate Court is presided over by a County Court judge or provincially appointed registrars. The rest of the courts are provincially administered and appointed.

6.1.1 The Appeal Division of the Supreme Court of Nova Scotia

The Supreme Court is established by the *Judicature Act*,[12] and consists of two divisions: the Appeal Division and the Trial Division. The Appeal Division is composed of six judges and the Chief Justice of Nova Scotia, all federally appointed by the Governor General in Council. There is one supernumerary (retired) judge. The court sits on a regular basis in Halifax and is the top court in Nova Scotia. The only court above it is the Supreme Court of Canada.

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[12] *R.S.N.S. 1989, c. 240.*

The Appeal Division hears appeals in both civil and criminal cases from the Trial Division of the Supreme Court, and the County Court. In certain instances it hears appeals directly from the Provincial Court and the Family Court. The court generally sits with a quorum of three judges and, on occasion, with five. It may sit with one or more divisions of three judges and one judge may hear interlocutory matters in chambers.

The court is assisted by a registrar, appointed by the Lieutenant Governor in Council, who may hear interlocutory applications, signs all orders of the Appeal Division, and ensures that all appeals are perfected. The registrar is also appointed as:

Prothonotary of the Supreme Court, Trial Division,
Clerk of the County Court,
Clerk of the Crown,
Registrar of the Supreme Court (Trial Division) for Divorce and Matrimonial Causes,
Accountant General,
Registrar in Bankruptcy, and
Clerk of the Small Claims Court.

6.1.2 The Supreme Court of Nova Scotia (Trial Division)

Established by the *Judicature Act*, this court functions as the highest level of trial court in Nova Scotia. The Trial Division consists of the Chief Justice of the Trial Division and 13 other judges who are appointed federally by the Governor General in Council (S. 17(2)). The court is also served from time to time by retired judges who sit on a part-time basis. Sittings of the court take place regularly in Halifax and Sydney and at least twice a year in 18 other locations with permanent court registries.

The Trial Division's jurisdiction extends from $3,000.00 upwards. There is no ceiling on the amount involved. It also has a criminal jurisdiction and is the only court to hear criminal jury trials. A considerable part of its civil jurisdiction involves family matters such as nullity, divorce and corollary relief, judicial separation, matrimonial property, custody of and access to children, and legitimacy.

The Trial Division administers the *Divorce Act* [13] with the assistance of registrars of divorce appointed in each of 20 court offices throughout the Province. Most uncontested divorce cases outside Halifax are heard by Local Judges of the Trial Division (County Court judges). Uncontested divorces at Halifax are heard by a judge of the Trial Division.

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[13] *Stats. Can., 1986, c. 4.*

The Trial Division also administers the *Bankruptcy Act*[14] with the assistance of four registrars of bankruptcy. Registrars are appointed in each of four zones, namely Yarmouth, Sydney, Halifax and Pictou. The prothonotaries in each of these areas hold appointments as registrars. The Trial Division judges hear all contested bankruptcy matters in chambers when one party objects to the registrar hearing the matter.

6.1.3 The County Court

A second level of trial court is the County Court. This court is established by the *County Court Act*.[15] The court consists of the Chief Judge of the County Court and ten other judges who may also sit as Local Judges of the Supreme Court under Section 23 of the *Judicature Act*. All are federally appointed by the Governor General in Council.

In contrast to the Supreme Court, the County Court is actually seven (7) separate district courts, each with its own judge except District #1 (Halifax County), which has four, and District #7 (Richmond, Victoria and Cape Breton Counties), which has two. The County Court sits in 20 permanent locations (like the Supreme Court, Trial Division) with permanent registries that are shared with the Supreme Court. The County Court also sits in 12 circuit locations, each with a permanent registry.

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[14] *R.S.C. 1985, c. B-3.*

[15] *R.S.N.S. 1989, c. 106.*

Each judge must reside in his or her own district. The County Court does not operate circuits, though each judge circulates within his or her district if there is more than one court house. Judges frequently sit in each other's district to help out.

The jurisdiction conferred on the County Court is concurrent with that of the Supreme Court, Trial Division except for certain monetary and subject matter restrictions. Its civil jurisdiction is limited to cases where the amount claimed is $50,000 or below. Any claims above this amount must be heard by the Trial Division of the Supreme Court. Similarly, the County Court cannot hear actions involving the validity of any devise, bequest or limitation or actions involving the recovery of land. It does, however, have jurisdiction over marriage, custody and access, adoption and change of name, but not divorce.

In criminal matters, the County Court has the authority to try most indictable offences without a jury where the accused consents. The excluded offences are treason, murder, piracy, corrupting justice and a few other classes of offences which fall within the exclusive jurisdiction of the Provincial Court.

The County Court hears appeals from judgments and final orders of Family Courts, Provincial Courts, Small Claims Courts and Residential Tenancy Boards.

6.1.4 Court of Probate

This court is established by the *Probate Act*.[16] It consists of County Court judges who sit as Probate Court judges in the same location as the County Court. The jurisdiction of this court includes wills, estates and guardianship of infants. Most uncontested matters are dealt with by registrars of probate, whose decisions are appealable to the local County Court judge who has been designated as the Judge of Probate.

6.1.5 Family Court

This court was established in 1971 pursuant to the *Family Court Act*.[17] It consists of 18 provincially appointed judges. The court sits in nine permanent locations but its judges travel around the Province and hear family disputes in 15 other locations on a regular basis.

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[16] *R.S.N.S. 1989, c. 359.*

[17] *R.S.N.S. 1989, c. 159.*

The court is administered by the Department of Community Services and reflects a philosophy that family problems should be dealt with in an informal environment which is less confrontational than in the normal court. Because a significant proportion of the litigants in Family Court are unrepresented by legal counsel, the court operates with a simplified procedure. It also has a limited array of support services to assist the court.

Because of constitutional limitations, the Family Court cannot hear divorce petitions, nor can it order the division of matrimonial property or exclusive possession of a family home. These matters must be dealt with by either the Supreme Court of Nova Scotia or a County Court judge acting as a Local Judge of the Supreme Court. The Family Court can, however, hear many other matters involving family disputes such as maintenance, child protection, child custody and family violence.

Judges of the Family Court are authorized to perform marriages pursuant to the *Solemnization of Marriage Act*[18] and can hear applications from persons under 16 years of age who seek permission to marry.

The Family Court is also designated as a youth court for hearing matters involving young people between the ages of 12 and 15 inclusive, who are charged under the *Young Offenders Act* (Canada)[19] or the *Young Persons Summary Proceedings Act* (Nova Scotia).[20] Young offenders between the ages of 16 and 18 are sent to the Provincial Court for a hearing.

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[18] *R.S.N.S., 1989, c. 436.*

Family Court hearings are not open to the public except for matters heard under the *Young Offenders Act*.

6.1.6 Provincial Court

This court was established in 1976 by the *Judges of the Provincial Court Act*,[21] when magistrates were declared to be Provincial Court judges. It consists of the Chief Judge and 27 other judges who are appointed by the Province. It has a court administration that is separate and distinct from that of the Supreme and County Courts.

The Provincial Court sits permanently in 16 locations and Provincial Court judges travel around the province to hear cases in 26 other locations.

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[19] *R.S.C. 1985, c. Y-1.*

[20] *R.S.N.S., 1989, c. 509.*

[21] *R.S.N.S. 1989, c. 238.*

All criminal proceedings start in the Provincial Court and it is estimated that 90 to 95 percent of all criminal prosecutions are heard by Provincial Court judges.

The Provincial Court has exclusive jurisdiction to hear all summary offences (minor offences) for violations of the Criminal Code, provincial statutes and federal statutes and regulations. In addition, Provincial Court judges have jurisdiction to try most indictable offences where the accused consents and has exclusive jurisdiction to try some indictable (serious) offences. They also hold preliminary hearings to determine whether there is enough evidence to have a trial where an accused elects trial in the County Court or the Supreme Court.

The Provincial Court operates as a youth court under the *Young Offenders Act* and hears cases involving 16 and 17 year old offenders.

Appeals from decisions of Provincial Court judges go to the Supreme Court, Appeal Division, if they involve indictable offences, and to the County Court if they involve summary offences.

6.1.7 Small Claims Court

Although administratively attached to the County Court, this court is, in reality, a separate court.[22] Using legally trained adjudicators, the court hears civil cases where the amount claimed is $3,000 or less. This is a jurisdiction which the Small Claims Court shares with the County Court but not with the Supreme Court.

Since many of the litigants represent themselves, the court uses a very simple procedure involving minimal costs. Adjudicators generally adopt a more active approach than in the usual court in order to help the unrepresented litigants present their cases as fully as possible.

Appeals go to the County Court by way of stated case.

6.1.8 Halifax City Court

The City of Halifax administers its own court presided over by Provincial Court judges.[23] This court has the same legal jurisdiction as the Provincial Court but is confined to offences occurring within the City, many of which involve minor traffic offences and municipal bylaw violations.

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[22] *The court was established in 1980 pursuant to the Small Claims Court Act, R.S.N.S., 1989, c.16.*

[23] *Established pursuant to S. 543 of the Halifax City Charter, c. 52, S.N.S., 1963.*

Although the court technically still has a limited civil jurisdiction over small claims, in actuality, all such claims are brought and heard in the Small Claims Court.

6.1.9 Justices of the Peace

Although they do not preside over a distinct court and so do not constitute part of the court structure, this group of semi-judicial officials called justices of the peace continue to play a significant role in the criminal justice system. Although not as important as they used to be and with many of their duties now assumed by Provincial Court judges, justices of the peace constitute the first rung on the criminal law ladder. In Nova Scotia, these officials are, for the most part, restricted to swearing informations, issuing summonses and warrants, with several "designated" justices of the peace having authority to issue search warrants and grant bail remands. In some other provinces, justices of the peace are used in a more adjudicative capacity and hear minor traffic cases and municipal bylaw violations.

6.2 Court Administration

6.2.1 Supreme, County and Provincial Courts

The Department of Attorney General in Halifax, and specifically the Executive Director of the Courts and Registries Division, is responsible for the administrative support provided the Supreme, County and Provincial Courts. The Director of Court Support Services, two Deputy Inspectors, one Regional Manager and four Regional Transportation Coordinators all report to the Executive Director. The Courts and Registries Division has over 100 permanent office locations within the province and employs 560 persons, including a number who are justices of the peace.

6.2.2 Family Court

The Family Court is the administrative responsibility of the Department of Community Services. The support staff is the direct responsibility of the Regional Administrators of the Department of Community Services who report to the head office of the department.

6.2.3 Staff and Facilities

With the exception of the Halifax City Municipal Court, where the employees are provided by the City, the Province is responsible for providing clerks, prothonotaries, sheriffs and reporters for all levels of court. Individual municipalities provide facilities for the County and Supreme Courts. In Halifax, the Halifax Court House Commission administers the cost sharing agreement involving the Cities of Halifax and Dartmouth, the County of Halifax, and the Province.

6.3 Jurisdiction and Duties of Prothonotaries and Clerks

Prothonotaries and clerks are appointed by the Lieutenant Governor in Council in accordance with the *Prothonotaries and Clerks of the Crown Act.*[24]

Where a Supreme Court order is consented to by all parties, a Prothonotary may:

- change the solicitor of record;
- amend any pleading;
- appoint a special examiner to take evidence abroad;

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[24] *R.S.N.S. 1989, c. 364.*

- fix a date for assessing damages, taking accounts, advertising creditors;
- release any exhibit;
- confirm a verbal order made by the Supreme Court;
- discontinue a proceeding;
- dismiss a proceeding of any party who is not under a disability;
- waive a provision of any procedural rule;
- grant an order to issue and serve a petition for divorce outside the province;
- tax solicitors' bills of costs;
- grant leave to renew an originating notice for a further period of six months;
- grant leave to renew an execution order for a further period of 12 months;
- grant orders for interlocutory or final judgments.

In Nova Scotia, all prothonotaries are also appointed clerks of the Crown for processing of Criminal Code elections to County Court, clerks of the County Court, and clerks of the Small Claims Court. There are 18 prothonotaries appointed to operate the registries or court offices. In Halifax, there are two deputy prothonotaries. The Prothonotary at Halifax is, by tradition, a member of the Nova Scotia Bar.

7. MERGER OF COUNTY AND SUPREME COURTS

7.1 Introduction

Nova Scotia is the only Province in Canada with County Courts. British Columbia's County and Supreme Courts merged July 1, 1990[25] and Ontario's Courts merged September 1, 1990.[26] At one time all provinces except Quebec had County Courts or their equivalent. The trend to a single civil court began in 1975 in Prince Edward Island. Alberta followed in 1978; New Brunswick in 1979; Saskatchewan in 1980; Manitoba in 1983 and Newfoundland in 1986.

This trend is no reason to merge the Supreme and County Court in Nova Scotia, but it is reason to carefully consider our options.

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[25] *In 1989 the British Columbia provincial legislature passed the Justice Reform Statutes Amendment, the Supreme Court Act, the Rules Act and the Small Claims Act, which have the effect of abolishing the County Court and amalgamating the jurisdiction it exercised with that of the Supreme Court.*

[26] *In 1989 Ontario passed legislation to consolidate the District Court, the Surrogate Court, the High Court of Justice and the Provincial Court into a single court called the Ontario Court of Justice. See An Act to Amend the Courts of Justice Act, S.O. 1989, c. 55, Court Reform Statute Law, S.O. 2989, c. 56 and An Act to Amend the Courts of Justice Act, S.O. 1989, c. 70.*

7.2 Options

There are three broad options: (1) complete merger, (2) partial merger, and (3) complete separation.

7.2.1 Complete Merger

Complete merger would create one court where we now have two.

7.2.2 Complete Separation

Complete separation would stop the work sharing between the two courts that occurs now. County Court judges would no longer sit as Local Judges of the Supreme Court to hear divorces, for example. It implies either: (1) a reordering of the tasks assigned the courts so that the County Court would hear cases that are appropriate for local courts and the Supreme Court would hear cases that are not, a difficult distinction to draw; or (2) that the two courts would have exactly the same powers and functions but not cooperate.

7.2.3 Partial Merger or Retain the Status Quo

We have a form of partial merger now but it is only one choice in the spectrum between complete merger and complete separation. The only constant in this option is that there would be two courts sharing some aspects of their operation.

For instance, the courts could share administrative support but not jurisdiction, or vice versa. They could share jurisdiction over some matters only. They might not share jurisdiction or administration but be authorized to delegate cases freely back and forth. All the judges of one court could also be judges of the other. The possibilities are endless.

7.3 Considerations

Each of the options has strengths and weaknesses. As we reviewed them, we considered a number of factors.

7.3.1 History of the County Court

Why does a province of 873,174 people[27] have two partially merged trial courts? The reasons are historical. The County Court as we know it today was established in 1876[28] to give justice a presence throughout the Province and resolve local problems expeditiously and more cheaply than the Supreme Court (which then, as now, resided in Halifax). In short, the County Court was established for the same reasons we are considering its abolition.

Initially, it was seen as having a status or position below the Supreme Court but higher than justices of the peace and the magistrates. Gradually its jurisdiction expanded and its judges have taken on many of the duties of Supreme Court judges. However, there remain matters that must be dealt with by the Supreme Court such as jury trials, civil actions over $50,000 and Prerogative Writs.

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[27] *1986 census.*

[28] *The Court of Common Pleas, the forerunner of the County Court was abolished in 1841. From 1841 to 1876 there were no County Courts in Nova Scotia. They were re-established by statute in 1874. See An Act to Establish County Courts, S.N.S. 1874, c. 18, proclaimed in force 1876. For a more complete account of the role of local courts in Nova Scotia, see History of Nova Scotia Courts, Appendix 1.*

7.3.2 The Present: Partial Merger

Partial merger began in the last century. Since 1897 County Court judges have been authorized to hear Supreme Court cases if requested by that court. Today many of the services that are in the exclusive jurisdiction of the Supreme Court are also performed by County Court judges sitting as Local Judges of the Supreme Court.[29]

Local Judges of the Supreme Court do not enjoy the full powers of a Supreme Court judge. However, their jurisdiction is extensive.[30]

There seems to be a practical merger of jurisdiction but these arrangements strike us as unnecessarily complex and confusing.

The administrative support provided by the Attorney General's Department is merged. The clerks of the County Court are also the clerks of the Supreme Court though they are called prothonotaries of the Supreme Court.

There is also the organization of the County Court itself to contend with. Because the County Court is really seven district courts, County Court judges only have authority in the district for which they are appointed. Of course, illness, vacation, conflicts and crowded dockets from time to time, demand the services of more than one judge. But, aside from Halifax and Cape Breton Counties, there is not enough work for two judges in any one district. The County Court Act was amended in 1949[31] to allow additional judges to be appointed in each district. The practise has been to appoint the County Court judges as "additional judges" for each other's districts. So, if the judge of District 2 cannot hear a case, the judge appointed for District 3, say, will visit and hear the case, not as District 3's judge, but as "an additional judge for District 2". This too is unnecessarily complex and confusing.

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[29] *The Judicature Act, R.S.N.S. 1989 c. 240, s. 25.*

[30] *See Civil Procedure Rule 36 and Section 23 of the Judicature Act in Appendix 4.*

7.3.3 Residence and Circuits

There is one significant, practical distinction between the Supreme and County Courts: residence. The Supreme Court resides in Halifax while County Court judges are distributed around the Province.

A majority of the county bar associations and individual lawyers who wrote to us favoured complete merger but only if it could be done without reducing local access. If merger means that all County Court judges move to Halifax, support for the concept disappears.

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[31] *S.N.S., c. 57, s. 1 (3).*

Judges are a visible symbol of the justice system. It is desirable that every community recognize at least one member of the judiciary as "one of their own". Of course this does not require a superior court judge in every village, but certainly not all judges should be concentrated in Halifax.

The services the County Court provides cannot be delivered effectively by a circuit Supreme court. Resident judges provide emergency access, something that is particularly important in volatile situations such as domestic disputes. They are familiar with local customs and circumstances.

At the same time, residence is a doubled-edged sword. A judge who lives in a community will have insights into the people who come before the court that a circuit judge could never acquire. This can be a significant advantage in dispute resolution. However, we were cautioned that a longtime resident judge can become too enmeshed in the community. Preconceptions that are detrimental to justice may grow in the mind of the judge or in some members of the community.

We also heard lawyers who had great respect for the local judge but said that there were certain kinds of cases they would prefer to take before another judge. Judges and lawyers can simply go stale, particularly where the local legal community is small.

Circulation of judges reduces these problems.

7.3.4 Distribution of Work

A significant element of good management is the ability to allocate work. Strictly residential district courts are not well-suited to work allocation. The judges of one district may be struggling with a heavy workload while the judge in the next district may languish. Judges are our most respected and best paid public servants. They should each have a fair and full workload.

Available caseload statistics are inconclusive, they count cases not the time required to deal with cases. Nevertheless, a number of knowledgeable persons have told us that work is not evenly distributed among judges. This suggests a waste of resources. It does not suggest that some judges are shirking their responsibilities. It is, in part, a product of the two-court system. Two courts are not as conducive to work distribution as one.

7.4 Discussion - Is Change Desirable?

As the jurisdiction of the County and Supreme Courts becomes more alike, it becomes increasingly difficult to justify two separate courts.

The ideal situation from the viewpoint of the community and the legal profession would involve a locally resident judge with full judicial powers who would be available when needed but to whom the lawyer and client need not inevitably turn. This is a call for circulation of judges, not judge shopping.

This ideal situation does not now exist but some features of it do. Our present system does provide a resident judge who has most of the judicial powers of the Supreme Court. It provides circulation in the sense that a local lawyer can wait until the time designated for the Supreme Court judge to visit the locality if he or she wishes to avoid having the case heard by the local County Court judge. This will entail delay and, in some cases, it can be considerable.

The resident County Court judge, in addition to being readily accessible, brings to the case a fund of knowledge about local events and people. It may result, in some cases, in the judge finding it difficult to be completely objective. A visiting Supreme Court judge may bring a more detached perspective to a case but, lacking understanding of the local context, may arrive at a decision that is not the best in the circumstances.

Another important factor to consider, which is relevant to both the general public and the government, is the need to achieve the most effective and efficient use of the human resources available. A single court performing the tasks required with a single administration of both judges and support staff should result in a more cost-effective operation. Simplification of the judicial structure should allow for a more uniform distribution of work and enhance public understanding of the system of justice.

The direct result of merger would be to create a larger court with approximately 25 members.

Merger of the Supreme and County Courts has been opposed on the basis of the old adage "if it ain't broke, don't fix it" and championed with the observation that all the other Canadian provinces have merged their Supreme and County (or District) Courts. While the practice in other times and other provinces are instructive, we do not find either argument compelling. To accept the former is to preclude change and to accept the latter is to preclude diversity.

7.5 Analysis of Options

7.5.1 Complete Separation

We do not recommend complete separation.

There are two possible models: (1) two courts with totally separate jurisdictions; or (2) two courts with the same jurisdiction but providing services in a different fashion (i.e., local residence instead of circuits or different procedures). We concentrate on the first model.[32]

There would be two courts with separate jurisdictions representing a return to the original concept of the Supreme Court and County Court of 1874.

The Supreme Court[33] would reside in Halifax and have jurisdiction over major legal cases. The County Court would be organized into judicial districts and handle relatively minor matters. The County Court judges would reside in their districts but would have jurisdiction throughout the entire Province so that cross appointments would not be necessary. County Court judges would no longer sit as Local Judges of the Supreme

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[32] *There is no apparent rationale for the second model. Why should there be two courts performing exactly the same function? If a mixture of local residence and circuits is attractive, one court can do it better. If different procedures are desired, the rules of the single court can be drawn accordingly.*

[33] *For the sake of convenience we refer to the two courts by their current names.*

Court.

Some arguments advanced in favour of this option include:

(a) favours local autonomy;

(b) fosters an elite core of trial judges in a single, central location;

(c) requires less judicial management because of the small numbers of judges in each court;

(d) the County Court can develop simpler, more expeditious procedures.

Certainly these arguments are correct so far as they go. It could be said that local autonomy is good when local procedures are good and bad when they are bad. But it is also bad when there are good procedures but they are inconsistent with other localities. This is a small province. County Courts are good because a good judge is more likely to be in his or her home district; of course, so is a poor judge, and then it is bad. Maybe having two courts fosters an elite core of judges, but they all live in Halifax. It only requires less judicial management because there are fewer management opportunities. It is true the County Court could develop simpler procedures, but so could any court. So, we are not persuaded.

Some arguments advanced against this option include:

(a) there is no obvious distinction between "big cases" (which, presumably would go to the Supreme Court) and "small cases" (which would go to the local court); the current civil standard is monetary but the amount of money in issue is not necessarily related to the complexity of the legal issues;

(b) it reinforces the appearance of levels of justice;

(c) specialization will be discouraged because there will be two small pools of judges instead of one large pool;

(d) if it is true that the best candidates will be attracted to the new Supreme Court, it must also be true that it will be more difficult to recruit suitable candidates to the new County Court;

(e) rural residents will be more dependent on circuit judges (matters currently handled by County Court judges sitting as Local Judges of the Supreme Court would be dealt with by circuit judges who would be less accessible and less familiar with local circumstances);

(f) Supreme Court judges will spend more time travelling on circuits (and hence less time on the bench);

(g) it would discourage collegiality among all judges of the Province;

(h) it would not facilitate establishment of a unified family court or unified criminal court.

We think the arguments against complete separation, not only out number but also out weigh the arguments for separation. Local autonomy is only as good as the local judge. Even assuming an elite cadre of judges will develop and is a good thing, the "elite" judges would all reside in Halifax. The Supreme Court handles more small civil cases than the County Court now, so if more expeditious procedures are required, they should be at the Supreme Court. Two courts only require less management because less can be done with two small pools of judges than one large pool.

7.5.2 Partial Merger

This option can represent a maintenance of the status quo or a new allocation of work and administration between two courts. For the purposes of this discussion we assume two courts with a single administration and more sharply defined jurisdictions (perhaps along the lines of the complete separation model) but with the ability to allocate work back and forth between the two courts. It is possible, for example, that all the judges of one court would be ex officio judges of the other court.

Some arguments advanced for this option include:

(1) represents a compromise between the good and bad features of the other two options;

(2) is less disruptive than either of the other two options.

Some arguments advanced against this option include:

(1) it is a compromise and therefore not as good as it could be;

(2) it is not as simple, efficient, or available as it might be.

We recognize that the status quo works and can continue indefinitely, but it is not as good as it can be and, so should be improved. We do not think any of the other partial merger options address the inadequacies of the current system. Therefore we reject partial merger.

7.5.3 Complete Merger

Under this option there would be one court with all the powers and all the judges of the present Trial Division of the Supreme Court and the County Court.

This court could be organized as both a residential and circuit court. Initially, the judges of the County Court and Supreme Court would continue to reside where they are.[34] The largest group (the present Supreme Court judges and judges of the County Court for District 1, Halifax County) would be in metropolitan Halifax. This group would serve the metropolitan area and would also provide Province-wide circulation (though not necessarily circuits and, in any event, not as frequently as is current because the local judges could provide full service). The rest of the judges - in the initial years the current County Court judges for Districts 2 to 7 strategically augmented by one or two Halifax judges who volunteered to move - would remain distributed throughout the Province. As new appointments are made and better measures of demand are developed, judges would be more evenly distributed across the Province.

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[34] *Judicial independence guaranteed by the Charter of Rights probably prevents the forced movement of judges by the Executive branch of government.*

The eventual aim is to have judges residing throughout the Province on the basis of demand. Any redistribution this entails would be accomplished through new appointments. Once this is achieved all judges should circulate on a regular basis within their region and, to a lesser extent, outside their region, as required or as deemed appropriate.

7.5.4 Conclusions

We believe the Trial Division of the Supreme Court and the County Court should be merged into one Court composed of all the judges of both with all the jurisdiction of both. We favour this option for these reasons:

(a) it facilitates workload distribution; judges and cases could more easily be moved about and matched;

(b) provides greater opportunities for specialization because of the larger pool of judges;

(c) allows administrative economies of scale;

(d) provides full-service judges resident throughout the Province;

(e) the simpler structure is easy to understand and without jurisdictional confusion;

(f) it is consistent with the unified family court and criminal court;

(g) the other two options have little to recommend them.

As to the arguments against this option:

(a) dilution of the quality of current Supreme Court bench; we were unable to discern a marked difference in quality between the courts and even if there is, it is only a transition problem, and should not be determinative;

(b) dilution of quality of work (so that a position on the new court would not be as attractive as a position on the present Supreme Court making recruiting more difficult); we do not think there is a pronounced difference in the type of work and, to the extent there is, it is so small that we don't anticipate any impact on recruitment;

(c) geographic flexibility will draw more cases and more resources to Halifax; if this is a problem it can be addressed through docket control, regionalization and distribution of judges;

(d) reduces local autonomy; we do not think this is a bad thing, so long as local autonomy is not replaced by central autocracy;

(e) requires management of the judiciary; we do not think this is a bad thing, so long as judges manage judges;

(f) reduces judicial collegiality and collaboration; we think it will improve collegiality and collaboration for the judges residing outside Halifax.

Considering the options available it seems that the advantages of full merger with regionalization and circulation of judges outweigh any disadvantages. Any advantages of retaining the present County Court structure are outweighed by the disadvantages.

Our conclusion is supported by the reaction of individual lawyers, judges and County Bar Associations who strongly supported merger of the Supreme and County Courts. Only a small minority of lawyers opposed the merger. A larger number remained neutral. However, County Bar Associations were overwhelmingly in favour of merger.[35] No lay persons addressed us on this issue specifically.

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[35] *Of the twelve county bar associations that presented briefs to us, ten favoured merger, one was opposed, and one expressed no opinion.*

Recommendation 1

The Trial Division of the Supreme Court of Nova Scotia and the County Court should be merged to form a new court called the Supreme Court of Nova Scotia.

The present judges of the Trial Division of the Supreme Court and the County Courts should be the judges of the Supreme Court.

There should be an Associate Chief Justice of the new court.

No judge should be required by the Executive branch of government to change residence because of the creation of the Supreme Court.

Recommendation 2

The judges of the Supreme Court should circulate throughout the Province as directed by the Chief Justice of the Supreme Court.

When establishing the circulation of judges, the Chief Justice shall consider:

(a) the need for expeditious and equal access to the Supreme Court in every part of the Province to the greatest extent practical;

(b) the need to balance the workload and travel responsibilities among the judges of the court;

(c) the desirability of establishing a degree of specialization among members of the court;

(d) the desirability of providing a variety of judges throughout the province.

Recommendation 3

The present Appeal Division of the Supreme Court should be re-established as a separate court of appeal called the Nova Scotia Court of Appeal.

All members of the present Appeal Division of the Supreme Court of Nova Scotia be members of the new Court of Appeal.

The jurisdiction of the Nova Scotia Court of Appeal be the same as the jurisdiction of the present Appeal Division of the Supreme Court of Nova Scotia.

All members of the Supreme Court should be ex officio members of the Nova Scotia Court of Appeal by virtue of their appointment.

7.6 Judicial Regions

Flexibility is a key element of efficiency. We have seen that the seven judicial regions of the County Court necessitate cross appointments and discourage work distribution. Judicial regions bring rigidity.

But this rigidity also guarantees local service and a degree of local control.

We were told of cases that should be heard in the smaller centres but are somehow drawn to the metropolitan areas. We know that the Supreme Court has in recent years increased its circuits in an effort to ensure service throughout the Province. Yet the representatives of the County Bars tell us this problem continues. A variety of reasons have been advanced, and it is impossible to say if it persists and, if it does, who, if anyone, is to blame.

The perception alone is undesirable. If justice is to be part of a community it should operate to the greatest practical extent in the community.

There is also cost to be considered. One possible reason for cases to cluster in Halifax is that demand follows services and services follow demand. Which is to say: cases go to Halifax because there are more judges and courtrooms there. The more cases that come to Halifax, the more judges and courtrooms will be placed there. And so it goes. Land and construction costs are generally higher in metropolitan areas than in smaller centres so this process would tend to place courtrooms where they cost most.

Judicial regions provide a framework to resist the tendency towards metropolitan areas.

The Province should be divided into four judicial regions with at least two judges in each region. The judges in each region, except Halifax, would circulate within the region. These judges would also be available to hear cases outside their region. All judges would have plenary powers and jurisdiction throughout the Province.

The judicial regions need not be set by statute. The boundaries of each judicial region and the number of judges resident in it could be set by regulation as passed by the Lieutenant Governor in Council. The number of judges in a region should be set objectively, according to local demand as a proportion of total province-wide demand.

This is not to suggest that judicial regions and numbers of judges would be changed frequently. They should not. But when significant, long-term changes are recognized they could be easily and swiftly accommodated.

7.7 If Regions, What Size?

Communities and regions have changed beyond recognition since the County Court was organized into seven districts one hundred sixteen years ago. Shire towns have given way to regional centres. Regional schools have replaced community schoolhouses. Nova Scotians may lament the passing of village life but it is clear that travel is easier and our horizons broader.

It follows that judicial regions can be larger today. A judge can live farther away in the 1990's than in 1874 and still be considered part of the community.

Hence there can be fewer judicial regions and more than one judge resident in each.

7.8 What Regions?

The Department of Attorney General is considering reorganizing its Courts and Registries Division into four regions; Cape Breton, Central, Halifax County and Southwestern.[36] The Central Region is operating on a pilot basis now. The Director of Public Prosecutions has established a regionalized system[37] and has adopted the same regions as projected by the Attorney General's Courts and Registries Division.

The judicial districts need not be the same as the Director of Public Prosecutions and the Attorney General's. Some requirements may be different. However, it seems to us that there is merit in all three adopting the same regions. The Task Force also recommends[38] local court management committees comprised of the four independent groups who regularly use the courts: the judges, the private bar, the Crown lawyers and the court administrators. If these are instituted, even on a pilot basis, the benefits of three of the four groups operating on the same regional lines are obvious.

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[36] *Cape Breton region is comprised of Cape Breton Island. The Central region is the Counties of Guysborough, Antigonish, Pictou, Colchester and Cumberland and the area served by the courthouse in Shubenacadie. The Halifax region is Halifax County. The Southwestern region is the Counties of Hants, Kings, Annapolis, Digby, Yarmouth, Shelburne, Queens and Lunenburg.*

[37] *In accordance with Recommendation 45 of the Royal Commission on the Donald Marshall Jr. Prosecution.*

[38] *Recommendation 99.*

Recommendation 4

The Province should be divided into judicial regions for the purposes of the Supreme Court.

Judicial appointments should specify the region in which the appointee is to reside.

Judges should be appointed to a region on the basis of regional demand as a proportion of total province wide demand but in no case should there be fewer than two judges in each region.

There should be four judicial regions: Cape Breton, Central (composed of the Counties of Guysborough, Antigonish, Pictou, Colchester, Cumberland, plus the area served by the courthouse in Shubenacadie), Halifax (Halifax County), and Southwestern (the counties of Hants, Kings, Annapolis, Digby, Yarmouth, Shelburne, Queens and Lunenburg).[39]

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[39] *The population and distribution of judges and lawyers by region is set out in Appendix 5.*

8. FAMILY LAW

8.1 Current Situation

8.1.1 Introduction

By far the greatest number of submissions we received concerned family law and the related issue of domestic violence. Certainly no other topic occupied more of the Task Force's time or engendered more animated debate.

Changing social conditions and values have radically altered family relationships. One result has been marriage breakdowns that are estimated to have reached the 40% level. Another result is that more is demanded - both quantitatively and qualitatively - of family law. Today family law is a distinct area of the law concerned with relationships between family members or between the family and society. Its primary goal is to resolve problems.

8.1.2 Role of Family Court

It is the remedial, therapeutic role that distinguishes family courts from the conventional adjudicative function of the other courts. The Ontario Law Reform Commission explained the need for a family dispute resolution process:

> *"With society in transition, with changing social conditions, attitudes and mores, and with the impact that these often bewildering changes are having on family life, increasing pressure is being brought to bear, not only for reform in substantive family law, but also for reform in its administration. More and more is being and will be demanded of family law and it is the Family Courts that will have to carry the increased burden.*
>
> *One of society's major concerns today is to preserve and protect its basic unit - the family. To further that objective it should strive in the words of the Chief Judge of the Provincial Courts (Family Division):*
>
> > *......to sustain the unity and harmony of the family; to repair, where there is a breach; to reinforce the remainders of the unit where the breach is irreparable; to strengthen the inadequate; to control the weak; to guarantee individual rights; [and] to enforce individual responsibilities.*

The Family Court, having as it does, a distinct social purpose, is in a singular position to contribute to the community's achievement of its goal, and it is to this court that the public should look with increased confidence for help when family problems beset them.

A number of factors make the present Family Court system inadequate to respond properly to the needs of the community.

One of the principal factors is the confusion and uncertainty as to what the function of a Family Court should be. Should it function as a court of law or a social agency? There are those who feel that Family Courts must be first and foremost courts of law and not social agencies.

Family Courts must be law courts, not social courts... the Family Court must be a court of law, a court of lawyers, and a court of justice.

Supporters of this view feel that Family Courts should be seen to do justice, that is, they should administer justice publicly, and in accordance with established legal principle and precedent. Family law problems nearly always involve a dispute of facts, an invasion of privacy and a highly charged emotional atmosphere. Only if the Family Court functions as a court of law can the "kernel of truth" be separated from the "chaff of imagination, prejudice and falsehood", can inquisitorial techniques be minimized; and can the rights of the parties concerned be adequately protected. The gravity of the issues that come before a Family Court *demand an impartial judge, and strict adherence to accepted legal procedures.*

Others feel that what distinguishes the Family Court from all other courts is its social purpose, and that its proper function is to find social solutions to the problems that come before it. Supporters of this view believe that the primary function of the Court is to reconcile families, and that if the Court operates on a strictly legal basis, the very nature of the adversary system will harden attitudes between the parties making voluntary adjustment and reconciliation much harder to achieve. They are convinced that what is required is an informal, paternalistic approach, so that the parties can be encouraged to talk about their problems, and make up their own minds as to what is best...

The answer to this problem, of course, is clear. It is not, or should not be, a question of adopting one theory or another.

By their very nature Family Courts have a twofold function, judicial and therapeutic, and there is room for both theories to operate. Indeed, each complements the other in the rather special context of a Family Court. The question really is how to incorporate the best of both approaches into the procedure of the Family Court..."[40]

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[40] *Report on Family Law (1974), pp. 1 & 2.*

8.1.3 The Family Court In Nova Scotia

A Family Court was established in Nova Scotia on a pilot project basis in 1965. In 1971 it was extended province-wide and now consists of 18 Family Court judges at 24 Family Court sites with 105 Family Court personnel.[41]

The Court is administered by the Department of Community Services on the philosophy that family law problems should be dealt with in an informal environment less adversarial and confrontational than in other courts. The intention remains to develop support services for the Court that would enable family problems to be dealt with in an holistic manner. This broad ideal has not been entirely achieved. The main services which have developed are intake, enforcement, and young offender services. In some areas of the Province, short term counselling and referral services are provided.

8.1.4 Fragmented Family Jurisdiction

Although the Family Court is the court that specializes in family problems, it does not - and cannot - deal with the whole range of family legal problems. This is due in large measure to an innocuous looking section of the *Constitution Act*, 1867.

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[41] *The Family Court replaced the Juvenile Court, which had operated on a province-wide basis since the 1920's.*

Section 96 of the *Constitution Act*, 1867, implicitly limits the jurisdiction of provincially appointed judges. A provincial appointee, such as a Family Court judge, cannot deal with matters traditionally dealt with by a "superior" (federally appointed) court. Only federal appointees can function as superior court judges. Nothing short of a constitutional amendment can change this.[42]

This gives rise to the following kinds of problems:

(1) Family Court has exclusive jurisdiction under the *Family Maintenance Act*[43] to award maintenance between common-law couples, while the Supreme Court has exclusive jurisdiction to deal with their property.

(2) Family Court deals with many separation cases, but it can't order exclusive possession of a home, a common problem. Where both parties refuse to leave a home (common advice from lawyers), the Family Court is powerless. The parties must either litigate possession of the home in the Supreme Court or utilize a criminal process such as a peace bond or an assault charge in Family Court or Provincial Court hoping the court will order a party out of the home as a term of a probation order or recognizance.

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[42] *For example, divorce and property matters; see* *__Rudderham__ v. __Rudderham__ (1988) 14 R. F. L. (3d) 441 (N.S.C.A.).*

[43] *R.S.N.S. 1989, c. 160.*

(3) The Family Court hears criminal assault cases involving spouses, but cannot take preventative action such as ordering exclusive possession of the home or issuing restraining orders and injunctions.

(4) The Supreme Court lacks a "user-friendly" enforcement process for access and custody orders. Most divorce orders from Supreme Court are enforced in Family Court, thus creating two sets of files and involving two administrations.

(5) Supreme Court judges do not see the ongoing effect of divorce orders that are varied or enforced in the Family Court. Dealing with enforcement and variations is feedback that can be instructive to the court.

(6) Many times divorce maintenance enforcement proceedings in the Family Court are met by the assertion that circumstances have changed, and a variation of the Supreme Court order that sets the level of maintenance is sought. But the Family Court cannot vary Supreme Court Orders though the issues are so often before them. Family Court judges, sitting as referees, can recommend changes in the divorce order to the Supreme Court, but these recommendations must be approved by the Supreme Court and are subject to objection. The vast majority of divorce variations are made by Family Court judges sitting as referees. The process is confusing to lawyers and clients.

(7) Adoptions take place in County Court. Fathers of children born out of wedlock are not now entitled to notice in adoption proceedings and their consent is not required. In Family Court the father and mother are statutorily "equally entitled to the care and custody" of a child. If an adoption is in the wind, the father may seek to litigate in Family Court; the mother who perhaps wants her husband, the child's stepfather, to adopt, will approach the County Court.

(8) The Family Court hears child protection hearings. If a child is apprehended from the custodial spouse of divorced parents, and a determination made that there should be a custody change to the other parent, a separate divorce variation proceeding must be started in Supreme Court.

(9) A Family Court judge dealing with a child protection hearing may not be able to order an abusing parent out of a home. It may be the victimized child and the non-abusive parent who have to leave the home.

At present any one judge can deal with only part of a family's problem. The result is sometimes confusion.

Family law issues are prospective, not retrospective, highly emotional, and judges are expected to play a special role. But, because of our fragmented jurisdiction, effective management of family law cases is impossible.

If the family is litigating in different forums, the potential impact of one court is limited and may result in further polarization of the family. The court becomes a forum of reaction, not resolution, and problems that might have been resolved at an early stage fester.

8.2 Unified Family Court

8.2.1 Experience in Other Provinces

The way to overcome these problems is by creating a court that has legal authority to deal with all family matters. The idea is not new. It is commonly known as a unified family court. Following the recommendations of the Law Reform Commission of Canada in 1977, the federal Department of Justice entered into an agreement with four provinces to establish three year unified family court projects.[44] The first pilot court was established in Hamilton/Wentworth, Ontario in 1977, the second in Saskatoon, Saskatchewan in 1978, followed by one in St. John's, Newfoundland in 1979. The last unified family court pilot was established in Fredericton, New Brunswick, 1979. In 1982 the unified family court in New Brunswick was extended province-wide as the Family Division of the Court of Queen's Bench. Each of the other locations is continuing in operation following the pilot stage. In Prince Edward Island the Supreme Court hears all family law matters and in Manitoba family matters are heard at the Queen's Bench level.

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[44] *Report on Family Law, Supply & Services, Canada (1977).*

8.2.2 Options for Unification

It was virtually the unanimous opinion of those who made submissions to us, whether citizens, community agencies, lawyers or judges, that a unified family court was necessary. The most important question is how best to create it? The Task Force considered four possible approaches:

(1) Expand the jurisdiction of the existing Family Court to deal with a broad spectrum of family matters. Unfortunately, this would require a constitutional amendment.

(2) Establish a Unified Court as a division of the County Court. This option is not appropriate in light of our recommendation that the County Court merge with the Supreme Court.

(3) Establish a unified family court as a completely separate court with comprehensive superior court jurisdiction. Although possible, it was not considered advisable by the Task Force because of the duplication of court staff and added expense. Further, it is inconsistent with our objective of simplifying the court structure as much as possible.

(4) Establish a unified family court as a division of the Supreme Court of Nova Scotia. This would give the Family Court the needed superior court jurisdiction and simplify the overall court structure.

8.2.3 Best Option

We chose the fourth option, a unified family court as a Division of the Nova Scotia Supreme Court. We favour this because:

(a) it solves the jurisdictional and functional problems described earlier;

(b) no constitutional amendment is required to confer comprehensive jurisdiction on the Court;

(c) it reduces the number of courts, simplifying the structure;

(d) it removes the apparent hierarchy of justice in family law; and

(e) it allows judges to be transferred to the Family Division when there is a backlog of cases.

We hope to achieve the following:

(a) reduce feelings of confusion and frustration currently experienced by those attempting to use the court system to resolve family disputes;

(b) reduce the costs to litigants by consolidating the process;

(c) provide litigants with results that are understandable and durable;

(d) minimize the inconvenience and uncertainty that the litigants suffer.

We think a Family Division of the Supreme Court will reduce the number of hearings required to resolve any individual dispute, facilitate effective legal remedies and encourage the development of sensitive court personnel and support services.

We anticipate the new court will be organized on a regional basis.[45] There should be at least two Family Division judges in each region.[46] Existing facilities will be used and the number of judges to be appointed will take into account the volume of family law matters currently being heard by judges of the Supreme, County and Family Courts.

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[45] *See recommendation 4.*

[46] *We hesitate to recommend a minimum number. Recommended minimums so often become implemented maximums. Two will be inadequate in one or more regions and experience may show it's inadequate in all four. We can't say, but there is a need to guarantee that the new court will not be centralized in Halifax and a minimum number of judges in each region is the best way to ensure this.*

Recommendation 5

A unified family court should be created as a Division of the Nova Scotia Supreme Court.

The appointment of judges to the Family Division in each judicial region shall be determined on an objective basis: regional demand for Family Division services, as a proportion of total province-wide demand for Family Division services, but there should be at least two Family Division judges in each region.

There should be an Associate Chief Justice who is a member of the Family Division.

By constitutional necessity, the judges of the Family Division will be appointed by the Federal Government. If the court is to achieve its full potential it is important that appointments be made from among those who have been screened by the Federal Judicial Appointments Review Committee process and who have expressed an interest in family law and demonstrated some experience and ability in family law. The Task Force believes that a unified family court served by a knowledgeable and dedicated judiciary will have the greatest potential to realize the benefits of unification.

8.2.4 Assignment of Judges and Specialization

All of those who spoke to us about family law expressed the need for specialized judges. Task Force members are not predisposed towards judicial specialization. While we recognize that specialization facilitates the trial of technical matters and probably makes the law in any particular field more predictable, we think that without generalists the law will become compartmentalized and even more detached from ordinary people than it is now. In other words we think the courts have an important unifying role in society that generalists are more likely to fulfil.

We speak of this now, however, not to make the case for generalists but to underline the importance of specialization in family law. We want it understood that we believe Family Court judges should be specialists, not because we favour specialization but because the skills required by a Family Court judge are unique.

Some have suggested to us that there should be no movement of cases in or out of the Family Division of the Supreme Court. This is a strong and widespread view. One presenter told us that, in an emergency family matter where a Family Division judge was unavailable, it would be better to wait than go to a generalist judge.

We cannot accept this proposition. Each judge of the Supreme Court should have the jurisdiction to hear family matters even if that judge is not a member of the Family Division.

It was urged upon us that only persons appointed to the Family Division should ever hear family cases and that judges should not be reassigned (except to give Family Division judges a breather now and then). So Family Division judges could move out but no one could move in. Again we cannot accept this. It is too rigid and assumes that the Federal Government, when appointing a lawyer to the bench, is in a better position to assess the strengths and abilities of that person than the Chief Justice who, after all, will be able to observe the judge over a period of years. It assumes that judges don't change once they are appointed.

Therefore, our recommendations concerning the power of the Chief Justice to assign judges to cases would enable family cases to be assigned to judges who are not members of the Family Division and vice versa. Likewise, the Chief Justice would have the power to move judges from one division to another.

However, we caution that these powers should be used infrequently and in a manner consistent with the development of the degree of specialization required by family law cases. The exception to this general rule is the alleviation of temporary problems such as emergencies and local backlogs.

Recommendation 6

In general, the power of the Chief Justice of the Supreme Court to assign cases to judges and assign judges to one division or other of the Supreme Court should be used infrequently and in a manner consistent with the need to engender the degree of specialization required by family law.

This recommendation does not preclude the assignment of judges or cases in order to respond to temporary situations such as emergencies and local case backlogs.

8.3 Social Services

8.3.1 Current Services

At the present time, Family Court provides a limited range of services, primarily consisting of intake and maintenance enforcement at its 24 locations within the Province. Over the past decade, the court's jurisdiction has been steadily widened and the composition of its workload has become more complex, a trend reinforced by the new *Children and Family Services Act*, slated to come into effect in September of 1991.[47] With the new Act, effectively all matters involving children, excepting initial divorce orders, will be confined to the existing Family Court.[48] This expansion of jurisdiction will place new demands upon the present services. Unification will require a major overhaul of court related services.

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[47] *S.N.S. (1990), c. 5.*

8.3.2 Need for Services

(1) At the intake stage, a very high proportion of litigants will not have counsel, as many come to court first and see a lawyer second. A "passive registry" system, as is the case at the Supreme Court, is inadequate, since those coming to the court need advice and assistance to even identify their needs, legal or social. Unrepresented parties need direction and assistance throughout the court process in order to expedite and make hearings effective.

(2) The family court process assumes a range of social services. Modern family law emphasizes individualized decision-making in cases involving children. Mental health and social service professionals must be available to provide the necessary evidence. Without these professional services, the court's ability to adjudicate effectively is reduced.

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[48] *The Act is drafted for the current court structure, but it would not be difficult to adapt it to our recommendations.*

(3) Modern family law procedures discourage adversarial adjudication wherever possible. Conciliation, parental negotiation, mediation, court-encouraged negotiation, and settlement pre-trials have all become part of the wider range of vehicles encouraging the parties to agree rather than litigate. Judicial time is a scarce and expensive commodity. The practical pressures for other means of dispute resolution are considerable. Diversion is becoming more common: mediation will soon be available for child welfare cases; most divorces are granted without hearings already; a more "administrative" approach towards support enforcement is emerging. This trend assumes a range of available services.

(4) The driving force in much of modern family law is the principle of least intrusive intervention; a preference for preventive over curative measures; family conciliation and support over family breakdown; informal over formal solutions; voluntary over court-ordered settlement.

In the preamble to the *Children and Family Services Act*, the Legislature has expressly adopted this philosophy. A commitment to least intrusive intervention demands the adequate provision of social services, in a consistent and planned fashion across the full range of possible family problems before, during and after court involvement.

(5) The philosophical and policy arguments in favour of improved social services for the court are set out above. There are also compelling economic arguments for such services. The failure to provide adequate

services simply increases the demands upon scarce and expensive judicial time. For example:

(a) inadequate intake services means that more cases wind up before a judge, forcing the judge to assume those intake functions;

(b) the absence of conciliation and mediation services does not mean these functions are not performed, only that they are performed by judges;

(c) inadequate enforcement services result in more default hearings;

(d) insufficient legal aid funding means more unrepresented litigants and this means longer court hearings;

(e) the absence of a Family Court Clinic and the necessary timely assessments leads to fewer settlements, more protracted hearings and more time spent by lawyers and judges attempting to find alternate and likely less effective sources for the same information.

Simply put, the services will be provided by judges if they are not otherwise provided. We can either spend more for more judges or we can spend less for more social workers, staff and professionals. Thus, there are strong economic as well as philosophical arguments in favour of providing a wide range of effective services to the court.

8.3.3 Responsibility for Social Services

Administrative support to the Family Division of the Supreme Court would be the responsibility of the Department of the Attorney General[49] rather than the Department of Community Services. However, because fully integrated social services are absolutely essential if the new court is to be effective, the Department of Community Services should continue to be responsible for court-related social services. There are a number of reasons for this.

(1) The Department of Community Services has general responsibility for, and expertise in, social programs.

(2) Court-related social programs should be part of a comprehensive approach to all social programs. Many of the social services needed by the parties before the court (such as marital or family counselling, family assessments, adolescent services, mediation, and domestic violence programs) are also required by their children and other family members on a voluntary, non-court-related basis. To avoid fragmentation and duplication; to achieve the goals of least intrusive means of intervention and prevention; and to ensure cost-effectiveness; it is essential that such

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[49] *That is, the Department of Attorney General would continue to be responsible for administrative support to the Supreme Court, but that would include the Family Division. Administrative support includes staffing (such as prothonotaries, clerks, court reporters and sheriffs), furniture and other material requirements. Currently, municipalities supply court houses and, subject to any new arrangements that might be made regarding facilities, would continue to do this, including the Family Division.*

social services be planned and organized by the Department on a regional and sometimes provincial basis.

(3) Cost sharing with the Government of Canada is more accessible for jurisdictions whose court related social services are administered by community services departments. We were told that it is likely that the Province would lose federal cost sharing if court related social services were transferred to another government department.

(4) The Family Court is often involved at the beginning and end of social service delivery. Many people wind up in court only after social services and informal means of family dispute resolution have failed. Others, unaware of community services, come to the Court first, for it is a well known institution. This means that there will be two kinds of demands for social services: those referred out by Family Court staff to other community services (who may return to court later) and those whose cases require social services as part of the adjudication process.

However you choose to conceive the process, the Family Court plays a central role within the local social services system: receiving assessing, directing and ordering social service demands. It is unrealistic to plan and deliver services without involving the Court, even if the Court were to restrict itself (which it doesn't) strictly to a legal or adjudication role. We believe the Family Division will carry on this role and, in time, extend it.

For these reasons, the Family Court will inevitably perform both judicial and social service functions. The unification of the Family Court offers an unique opportunity to reconsider and reorganize some aspects of social services, to better serve the court so it can better serve the community. With the court's heightened status and enlarged legal jurisdiction must also come improvements on the service side if unification is to meet public expectations for an effective and more efficient Family Court. Because the family court has both a therapeutic and judicial function, it is essential that social services be an integral part of the structure.

Recommendation 7

The Department of Community Services should provide court-related social services to the Family Division of the Supreme Court.

8.4 Social Services Necessary to a Unified Family Court

8.4.1 Information and Intake Services

Intake services are crucial to the Family Court. Intake staff regularly explain the Court's role and philosophy to individuals and to the community at large. In addition, the effectiveness of intake staff has a direct impact upon the efficient functioning of the court, as intake staff perform a "triage" role, sorting out problems needing appropriate referrals out of the court and directing litigants into the court process.

Intake staff require a unique mix of social work and legal skills as they must be knowledgeable about family problems, community services, the basics of family law and Family Court procedures.

These specialized, interpersonal skills can only be acquired through a combination of job-specific training and "on-the-job" experience. Increased training for intake staff is essential as the court's jurisdiction and services are broadened. Most intake staff should have social work training or wide experience in social services as intake requires specialized interviewing skills to ensure a thorough analysis of the problem and to ensure the development of an appropriate action plan. If there is a single essential step that must accompany unification, it is recognition of the intake function and upgrading of intake skills.

Each permanent Family Court location should have professional and experienced intake staff.

8.4.2 Conciliation and Mediation Services

Most family law specialists agree that conciliation and mediation are preferable to adjudication. They encourage greater autonomy and control for those involved and avoid the adversarial problems of litigation. However, mediation of family disputes is still in its infancy in this province. Many lawyers complain of inadequate qualifications and uneven skills amongst mediators. This should improve because both the new *Divorce Act*[50] and the new *Children and Family Services Act* acknowledge mediation as a desirable means of dispute resolution.

The Department of Community Services, in close cooperation with the court and professional groups, should develop and enforce proper standards for mediators, as part of its general responsibility for family matters within the government. In the larger centres, it should be possible to retain full-time staff mediators who would work closely with the court yet retain the necessary arm's-length relationship from the judicial process. Panels of contract mediators could be developed in these centres to handle the overflow, as fluctuations in demand can be expected. In other areas, the Department could rely upon contracts for the court-related services. We see the Department serving as a catalyst to improve the quality and credibility of mediation in the Province.

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[50] *Stats. Can. (1986), c. 4.*

8.4.3 A Family Court Clinic

The individualized decision making demanded by modern family law statutes calls for specialized clinical service, devoted exclusively to court-oriented investigation and assessment of families, parents, children and adolescents in the range of custody, access, child protection, adoption and young offenders proceedings. Without such services or with such services offered only as a "sideline", the whole court process can be delayed and undermined, to the detriment of the families and children involved. The absence of such clinical services is a major defect in our present system. The failure to provide such a service will probably nullify many of the benefits of a unified family court.

A Family Court Clinic has to operate and be funded independently of the court it serves if its professionals are to be perceived as truly independent by those using the services. Equally, the clinic would have to be a distinct institution, independent of the Department of Community Services, which is often a party to Family Court litigation. In a province of our size, a Family Court Clinic operating under the aegis of an independent board drawing its members from community and professional groups as well as the Department and the court, has much to commend it. Such a clinic assures consistency in standards and facilitates planning of basic and specialized services on a regional and provincial basis, unlike the present haphazard approach.

A specialized, properly-funded clinic of this kind would have the potential to attract and keep skilled professionals in Nova Scotia, of considerable importance given our difficulties in obtaining child and adolescent psychiatrists and clinical psychologists. And, inevitably, the quality and usefulness of the assessments would be substantially raised, to the benefit of the court, the litigants and, most importantly, the children and adolescents involved.

Some initiatives are underway. The Department of Community Services and the Department of Health and Fitness fund two positions at the Atlantic Child Guidance Centre for the purpose of conducting assessments for the Family Court in Halifax and Dartmouth.

Recommendation 8

A full range of court-related social services, including conciliation and mediation, assessments and professional counselling are required if the Family Court or the Family Division of the Supreme Court is to be fully effective.

8.5 Procedure

The Family Court is not the same as the Supreme and County Courts. The clientele are less likely to be represented.[51] Matters are more often prospective, so time is of the essence. The aim is to mix adjudication with therapy.

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[51] *Between 25% and 60% (depending on the nature of the case) of parties are not represented by legal counsel.*

The British Columbia Justice Reform Committee in its 1988 Report to the Attorney General aptly described the differences in procedure between family courts and other courts as follows:

> *"Family Court aims at simplicity in its procedures and forms. There is very little paperwork involved in bringing or defending a Family Court application.*
>
> *Supreme Court on the other hand is formal in its procedures and leans heavily toward the written word. A family case in Supreme Court is treated very much the same as any other civil suit and is subject to the same general rules.*
>
> *People who are not represented by lawyers are generally more comfortable in Family Court. There, the forms are of the fill-in-the-blank variety and the judges are used to dealing with people acting on their own behalf.*
>
> *Supreme Court procedures presume that lawyers will be involved. To begin with, someone must produce the 'pleadings' - the documents that set out the essentials of the claim and the defence can be quite technical."* [52]

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[52] *At p. 42.*

Given these significant differences, care must be taken to ensure that the establishment of a Family Division of the Supreme Court does not result in a procedure unsuited to low income, unrepresented litigants. We therefore emphasize the importance of the Family Division having the power to develop its own rules of procedure. Family Division rules can be kept simple so that unrepresented litigants can appear before the new court with the same degree of informality that now prevails in the Family Court.

Recommendation 9

The Family Division should have rules of procedure that facilitate the use of the court by unrepresented litigants.

The Family Division rules and forms should be simple and expressed in plain language.

8.6 Youthful Offenders

8.6.1 Current Jurisdiction

At present, all Judges of the Provincial and Family Courts are designated as youth court judges. However, as a result of an administrative decision by the Nova Scotia Government, cases against 12 to 15 year-olds are generally dealt with in the Family Court while those involving 16 and 17 year-olds are heard in the Provincial Court.

Probation services and detention centres for the younger group are operated by the Department of Community Services while those for the older group are operated by the Department of the Solicitor General. There are different systems of alternate measures and community work service for the two groups as well.

Although the *Young Offenders Act*[53] does not call for it, there are, effectively, two youth courts in Nova Scotia.

8.6.2 One Youth Court

We have received differing submissions as to how young offenders should be treated and by which court their cases should be heard. While there is a difference of opinion as to which court is more suitable, the Family Court or the Provincial Court, a majority of those consulted were of the view that there should not be a division on the basis of age. That is, there should only be one youth court. Several reasons were put forth to support this conclusion:

(1) It frequently results in duplication of trials in cases involving co-accuseds where one is under 16 and the other is 16 or 17.

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[53] *R.S.C. (1985), c. Y-1.*

(2) It fosters two bureaucracies, both of which are required to develop similar services. This duplication appears unnecessary.

(3) Different approaches of the two departments in question creates functional problems for those trying to work in the system and confuses those dealing with young offenders.

(4) The division violates the spirit and intent of the *Young Offenders Act*. For example, the offences committed by 15 and 16 year olds are heard in different courts, thereby giving the appearance of different treatment of matters which are not dissimilar.

Those in favour of maintaining the current, divided jurisdiction argue that the behaviour of children in the 12 to 15 year category needs to be judged in the context of a family environment by a judge who can appreciate the impact of that environment, while older youths are more likely to be responsible for their actions and might benefit from a preview of the adult criminal court system.

On balance, we think it desirable to dispense with the present division of jurisdiction over youthful offenders and to have them dealt with by the same court.

Recommendation 10

There should be one youth court and, subject to the transfer procedures provided in the *Young Offenders Act*, all young offender matters should be dealt with in that court.

8.6.3 Which Court?

The more difficult question is which court should hear young offender matters.

Prior to 1908, young people charged with offences were dealt with in the same court and under the same legislation as adults. The *Juvenile Delinquents Act* (1908)[54] not only resulted in the development of procedures specifically intended to cover children in conflict with the law, it also contemplated a Juvenile Court separate from the courts in which adult matters were heard. Nova Scotia, historically, has had a separate Juvenile Court although at times there were judges who had concurrent jurisdiction. As far back as the 1920's, the Juvenile Court was seen as being different from the criminal courts and it was placed under the jurisdiction of the then welfare ministry.

We do not believe a separate court, in the structural sense, is required or desirable. Indeed, no one has suggested that to us. Our choice is between the Provincial Court and the proposed Family Division of the Supreme Court.

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[54] *S. C. (1907-8) 6 - 8 Edw VII, c. 40.*

However, regardless of its structural placement, clearly the youth court must be functionally different. The greater emphasis on rehabilitation alone justifies separate treatment.

The *Young Offenders Act* intends youth court to be different from the adult criminal court.

This functional separation from adult criminal court will be easier in the Family Division than the Provincial Court, which is, after all, the busiest adult criminal court.

Youth court judges apply criminal law and therefore must be abreast of developments in criminal law and the Charter. Provincial Court Judges are better able to do this than Family Division Judges will be. It is true that Family Division Judges will not be criminal specialists. However, the Task Force believes that the majority of young offenders cases - particularly those up to and including the age of 16 years - require familiarity, not only with criminal law, but more importantly with the dynamics of family life and remedial methods of conflict resolution. They are, in short, family problems in a criminal context. Therefore, if a choice must be made between family expertise and criminal expertise, we choose the former.

It was also argued that sending young offenders to the Family Division would be inconsistent with our goal of simplification of the courts. But, as young offender cases have both family and criminal aspects, a choice between a family court or a criminal court is unavoidable. Either jurisdiction over young offenders is removed from the rest of family law and sent to the Provincial Court, or removed from the rest of criminal law and sent to the Family Division.

It is the Task Force's view that, on balance, criminal behaviour by young offenders would benefit from the remedial approach of a family court. We were told that many young offenders present multifaceted problems requiring a judge familiar with human behaviour, family dynamics and criminal law. Empirical studies have revealed a remarkable overlap between child protection and young offender caseloads which suggests that there is considerable merit in a family court having jurisdiction over young offender matters both for practical and philosophical reasons.

A family court is in the better position to view the young offender's behaviour in the context of family and society and to take a holistic approach to the young offender in relation to behaviour, rehabilitation, and reintegration into family and community.

We believe the remedial aspects of young offender matters are paramount and therefore these cases are better dealt with in the Family Division of the Supreme Court.

Recommendation 11

The Family Division of the Supreme Court should be designated the youth court for Nova Scotia.

8.7 Domestic Violence

8.7.1 Current Jurisdiction

The Family Court has concurrent jurisdiction with the Provincial Court in relation to certain Criminal Code offences relating to children and where spouses are involved (including common-law spouses).[55] In the fiscal year 1987-1988, there were 615 prosecutions under Criminal Code provisions in Family Court.

The question is whether or not the Family Division of the Supreme Court should assume the present Family Court jurisdiction over these criminal matters or whether the Provincial Court should be given exclusive jurisdiction.

The Task Force considered this question at great length, mindful of the view expressed by women's groups that offences involving family members must be treated seriously and in such a way as to reflect society's abhorrence of family violence.

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[55] *i.e. Section 172 (Corrupting Children), 215 (Duty to Provide Necessaries to a Child), 264.1(3)(b) (Uttering Threats), 266 (Assault), 740 (Breach of Probation), 810 (Peace Bonds), and 811 (Breach of Peace Bond).*

8.7.2 Objectives

In assessing whether or not the Family Division should have jurisdiction in respect to Criminal Code offences involving family matters, there were a number of criteria which were brought to our attention through submissions and presentations, and which were helpful:

(a) there must be a speedy hearing of the matter and a speedy resolution;

(b) the hearing should be before a judge who is sensitive to the various dynamics of family violence;

(c) there must be an effective remedy;

(d) there must be a range of services available to victim and perpetrator (for example, victim support services and treatment for the batterer to help stop battering);

(e) the matter should be heard as discreetly and as privately as possible; and

(f) it is desirable to have other related family law issues (such as custody, access and maintenance) adjudicated at the same time in the same place.

8.7.3 Best Option

We concluded that the Provincial Court, by its very nature and because of the volume of cases it must deal with, does not now fulfill these objectives. And we do not think it is likely to. This does not mean the Family Division wins by default. To a degree the Family Court now meets some of these objectives. If our other recommendations are implemented, all of them can be achieved.

It should be noted that some mechanism, either legislative or administrative, will be required to ensure that the Family Division has jurisdiction over certain Criminal Code offences. This jurisdiction is now held concurrently by Provincial Court judges and Family Court judges by virtue of Order in Council.

We did not consider at length the expansion of the Family Division's jurisdiction over a wider array of offences relating to families and children, particularly serious assaults and sexual assaults involving family members. As the Family Division becomes accustomed to its jurisdiction and its services develop, serious consideration should be given to reviewing other Criminal Code offences involving family members to determine if the jurisdiction of the Family Division should be expanded.

Recommendation 12

The Family Division of the Supreme Court should assume the jurisdiction currently exercised by the Family Court in relation to offences involving family members. At a future date, consideration should be given to expanding the jurisdiction of the Family Division to include other Criminal Code offences involving family members.

8.7.4 Family Violence Court

In September of 1990 the Province of Manitoba established a Family Violence Court as part of its Provincial Court. The Crown attorneys and the judges of the Provincial Court will rotate through the Family Violence Court after they have been given specialized training in dealing with cases involving abuse of spouses, the elderly or children. The training includes awareness of the community resources available for victim and offender and the special dynamics that exist in family violence situations.

The Court will handle preliminary hearings where the accused elects to be tried by the Manitoba Court of Queen's Bench. This is a pilot project. At present the Court operates only within the City of Winnipeg and does not handle young offender cases. We think it shows great promise.

Although we recommend that common assault in a family relationship be dealt with by the Family Division of the Supreme Court, if the Manitoba project demonstrates that criminal courts can deal sensitively with victims, witnesses and the accused, this recommendation should be re-evaluated. Part of that evaluation would require a pilot project, similar to Manitoba's, in Nova Scotia. This should be undertaken if the preliminary results from Manitoba are encouraging.

Recommendation 13

The Department of Attorney General, Community Services and Solicitor General should monitor the Manitoba Family Violence Court experience and should consider a similar pilot if preliminary results from Manitoba are favourable.

Recommendation 14

If a Nova Scotia pilot project demonstrates that the Provincial Court can deal effectively and sensitively with the concerns of victims, witnesses and the accused, our recommendation that domestic violence ought to be dealt with in the Family Division of the Supreme Court should be reconsidered.

8.7.5 Training

During our public hearings it was frequently and forcefully impressed upon the Task Force that wife battering is a unique crime. We were told of the battered wife syndrome and how this syndrome impairs a woman's ability to extricate herself and her children from the battering situation.

The justice system was described as not responding quickly enough and when it did respond the result may not provide protection or a deterrent. Judges, lawyers and police were often seen as lacking the sensitivity to, and expertise in, the dynamics of family violence which resulted in their handling these cases in ways which were not helpful to the victim.

The Task Force accepts that family violence is a unique form of crime which cannot be dealt with simply by grinding out the case with run of the mill assault matters because to do so results in the justice system applying standards which fail to take into account the domestic difficulties of the victim. For example, an acquittal could result because the police or prosecution were unable to successfully illicit information or testimony from the victim because of their failure to understand the battered wife syndrome. Therefore, the Task Force believes that it is imperative for judges, lawyers, police, prosecutors and court staff to have specialized training on a regular basis to ensure they understand the nature of domestic violence and keep abreast of current knowledge on this subject.

Recommendation 15

Judges, lawyers, police, prosecutors and court staff should receive regular, specialized training to ensure they understand the unique nature of domestic violence and to ensure that they keep abreast of developments in this field.

8.7.6 Coordination

The justice system is seen as failing the victims of family violence in particular. This undermines public confidence in its ability to protect anyone. If the other recommendations in this Part are implemented, the system's response to family violence will improve, but domestic violence will certainly continue and the system will continue to be seen as faulty. Family violence is a multifaceted problem, beyond the abilities of any single institution. There must be a unified and coordinated effort on all fronts - justice, social services and helping agencies such as transition houses - if society is to help and protect the victim, and deter and rehabilitate the perpetrator.

The Task Force was told how "the system" can further victimize the battered woman and her children, resulting in their having to face poverty, inadequate housing, numerous court hearings, separation of family members from each other, and fear of reprisal. It was clear that greater initiatives are needed to deal with family violence issues. For example, there must be more effective needs assessment and planning; better service coordination; stronger client advocacy; public and professional education; prevention strategies, and development of treatment programs for batterers. These initiatives should be coordinated to ensure that various government departments and community agencies are working in a cooperative and effective manner.

Recommendation 16

The Government of Nova Scotia should, in relation to family violence, promote and encourage more effective needs assessment and planning; better service coordination; stronger client advocacy; public and professional education; prevention strategies and development of treatment programs for batterers.

The Government should develop a coordinating mechanism to ensure that the current initiatives, in relation to family violence, and those recommended above are implemented in an effective manner so as to inform and educate the public; help and protect the victim; and deter and rehabilitate the perpetrator.

8.8 Default in Support Payments and Enforcement

Many women who live on low incomes suffer financial hardship when the partner refuses to pay support. When this happens they have to go back to court for a hearing on the default. In some cases this involves considerable delay, particularly when the defaulter does not show up for the hearing or makes a payment just before the hearing and defaults thereafter, thus requiring another hearing.

When women receive social assistance, the value of the support payment is taken into account in determining their eligibility for assistance. If the partner does not pay, the women have to make up the difference until such time as they are able to notify the Department of Community Services of the default and receive an adjustment to their Family Benefits payments to reflect the lack of support payments. However, if and when the partner pays the support, the receiving spouse must pay it to social services. When the defaulting spouse pays irregularly, the woman must run back and forth between Family Court and social services with little financial support in the interim.

One reasonable response by the Family Court to default in support payments is to garnishee wages. This works for some but not for others.

In 1987 the Department of Social Services published the Report of the Task Force on Family and Children's Services. Among other things, the report recommended that an assignment of family maintenance program be introduced. Under this program, individuals in receipt of social assistance benefits receive the social assistance they would be entitled if they were not receiving maintenance payments. In return, the government takes an assignment of her rights under the maintenance order. If there is a default, the government recovers the delinquent payments.

A similar practice is followed in Ontario and has proven cost effective. Women and children should not have to endure the financial and emotional hardship of shuttling back and forth between Family Court and social services. The Family Division could record all maintenance orders in a central computer. Improved or accelerated enforcement efforts would improve the rate of payment.

Recommendation 17

The Province of Nova Scotia should allow people who are eligible for Family Benefits to assign maintenance or support payments, to which they are also entitled, to the Province and, in return, receive Family Benefits as if they were not entitled to maintenance or support.

8.9 Public vs. Private Hearings

There has been growing public pressure to have matters in Family Court tried in open court rather than "in camera" as is the current practice. The power to have "in camera" hearings in certain exceptional circumstances could be established. Currently it is the duty of the presiding judge "to guard against any publicity".[56] It is time that the restriction on Family Court hearings be re-evaluated. Openness is clearly the preferred policy in our society and, although we recognize the need for closed hearings in exceptional cases, openness ought to be the general rule. The need for closed hearings can be met by legislative restrictions on the reporting of the identity of litigants, including the identity of children and to protect the dignity of the family. In addition, the presiding judge can be given discretionary judicial powers to order "in camera" proceedings in the interests of the proper administration of justice.[57]

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[56] *Section 10 (2) of the Family Court Act.*

Recommendation 18

The present restrictions on open hearings in Family Court should be removed and replaced with a judicial discretion to order in camera hearings in prescribed circumstances.

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[57] *See Y.M. v. Children's Aid Society (1990) 94 N.S.R. (2d) 143.*

9. UNIFIED CRIMINAL COURT

9.1 Introduction

Merger of the County and Supreme Courts would mean that criminal matters would be heard by two levels of court: the Provincial Court (where the bulk of criminal cases are dealt with) and the Supreme Court. This has already occurred in other provinces[58] in the belief that a two-level system is simpler and more efficient than three levels.

The Law Reform Commission of Canada (L.R.C.C.) suggests a single provincial trial court hearing all criminal matters.[59] This unified criminal court would have complete criminal jurisdiction to hear all offences. The judges would each have equal powers and be of the same level. There would be no disparities between judges: all would have the same status, salaries, independence, facilities, forms of address, qualifications, and jurisdiction.

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[58] *The Province of Quebec, however, has always had just two levels. Recent restructuring there included an interesting reallocation of work. The jurisdiction of the first level court, the Court of Quebec, was expanded to include all non-jury trials.*

[59] *Law Reform Commission of Canada, Working Paper #59: Towards a Unified Criminal Court.*

9.2 Criminal Trial Courts of Nova Scotia - Current Structure

At present in Nova Scotia criminal trials are heard in Family Court, Provincial Court, County Court and the Trial Division of the Supreme Court.

9.2.1 Family Court

The Family Court has concurrent jurisdiction with the Provincial Court over Criminal Code (henceforth, "C.C.") offences relating to children and other offences involving spouses. The Family Court is one of two designated as a youth court and hears most cases where the accused is 12 to 15 years old.

9.2.2 Provincial Court

All summary conviction matters are heard in the Provincial Court (familial assaults may be heard in the Family Court instead), as are all hybrid offences where the Crown elects to prosecute summarily. Some indictable offences are heard exclusively by the Provincial Court (Section 553 C.C.). All other indictable offences (except those which are the exclusive jurisdiction of the Supreme Court pursuant to Section 469 C.C.) may be tried in the Provincial Court if the accused so elects (S. 554 C.C.).

The Provincial Court hears young offender matters involving sixteen and seventeen year olds.

9.2.3 County Court

Any indictable offence other than those mentioned in Sections 469 and 553 C.C. may be heard in the County Court, if the accused elects trial by judge without jury.

9.2.4 Supreme Court

Any indictable offence, other than those mentioned in Section 553 C.C., may be heard in the Supreme Court, if the accused elects trial by judge and jury. The Supreme Court has exclusive jurisdiction to deal with offences mentioned in Section 469 C.C.

9.2.5 Appeal and Review

An appeal in relation to an indictable matter is heard by the Appeal Division of the Supreme Court. An appeal in relation to a summary conviction matter is heard by the County Court and, in some circumstances, the Appeal Division of the Supreme Court. Bail review applications are heard by the County Court and the Trial Division of the Supreme Court. Applications for prerogative relief are made to a judge of the Trial Division of the Supreme Court.

9.3 Problems with the Existing System

The L.R.C.C. identified three problems with a multi-level court system which they thought a unified criminal court would address:

(a) the complexity of the judicial system;

(b) delays in the judicial process; and

(c) the apparent hierarchy of courts.

9.3.1 The Complexity of the Judicial System

To explain the procedural complexity of the present multi-level system, the L.R.C.C. quoted A. Cawsey, "Toward a Rationalization of Criminal

Procedure":[60]

> *"It would be difficult to imagine a Criminal Court system more complicated than the one now used in Canada. There are absolute and elective trial jurisdictions; there is a system of preliminary inquiry, applicable as law for some offences, applicable as a result of the accused's election for some other offences, and not applicable at all for yet another group of offences; then there are a variety of re-election provisions some which require the consent of the Attorney General and some of which do not. There is the final authority of the Attorney General to require the trial to be by judge and jury notwithstanding the election of the accused and imposed upon all of this is the right of the Crown to proceed by a preferred indictment. Lawyers have revealed that they are not familiar with the various methods of trial. While it may be inexcusable for a lawyer to fail to understand a court system it is doubted that the public have any understanding at all of our criminal trial system because of its complexity."*

9.3.2 Delays in the Judicial Process

According to the L.R.C.C. the multi-level court system "invites manipulation by lawyers" who elect or re-elect in order to delay proceedings and obtain an advantage for their clients.[61] Lengthy delays impair the effectiveness of our system of criminal justice and, in some circumstances, the rights of accused persons.

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[60] *(1979), 3 Prov. J. J. 6.*

Multi-level court systems seem to imply multiple court administrations resulting in duplication and confusion.

9.3.3 The Apparent Hierarchy of Courts

According to the L.R.C.C.:

> *"The existence of multiple levels of criminal trial courts contributes to a perception that there is a hierarchy of these courts with the Provincial Court at the bottom, the County Court in the middle, and the Supreme Court on top. Given that the bulk of criminal cases are tried in the Provincial Court, the perception that this court is at the low end of a qualitative hierarchy is an unhealthy reflection on our criminal justice system."* [62]

The L.R.C.C. also agreed with M. L. Friedman[63] that simply improving the lot of the Provincial Court judge was not enough to alter this impression. As Professor Friedman declared:

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[61] *At p. 12.*

[62] *At p. 13.*

[63] *"Magistrate's Courts, Functioning and Facilities", (1968-69), 11 Crim. L. Q. 52.*

> *"A fundamental change in the position of the magistrate in the judicial hierarchy is necessary. He now suffers from an inferiority complex because the Criminal Code puts him in an inferior position by treating him as a third class judge - below the Supreme and County Court judge."*

9.4 Advantages of a Unified Criminal Court

The L.R.C.C. says:

> *"(The U.C.C.) would be ideally suited as a vehicle for introducing sophisticated case-flow management principles and techniques into our courts. A single court would have responsibility for a criminal case from the point at which a charge is laid until its disposition. There would be no allowance for gamesmanship through the election and re-election process, since the only choices would be whether to have a preliminary inquiry and, in serious cases, whether to have a jury trial. Obviously, there would be no confusion as to the jurisdiction of the court or the powers of the particular presiding judges. The court would have complete criminal jurisdiction and the judges would all have equal*

> *powers. There would be no disparities between judges since they would all have the same status, salaries, independence, facilities, forms of address, qualifications and jurisdiction. There would be no possibility, therefore, of the public regarding some criminal courts and judges as being less competent than others."*[64]

Proponents of the unified criminal court system suggest that it, more than any other system:

(a) eliminates jurisdictional complexities such as elections and re-elections, which cause members of the public to hold the system in disrepute;

(b) eliminates much of the duplication and administrative inefficiency in the present multi-level court system;

(c) facilitates case management;

(d) eliminates the perceived hierarchy of the multi-level court system;

(e) allows judicial specialization resulting in a more efficient handling of cases;

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[64] *At pp. 33-34.*

(f) establishes judicial equality by providing each judge with the same title, facilities, salary and jurisdiction;

(g) requires fewer judges, courts and crown attorneys; and

(h) is consistent with the concept of a unified family court.

In theory, the unified criminal court will solve the stated problems with the present system. But it is an untested model. There are many questions regarding how it will work in practice.

9.5 Potential Problems with the Unified Criminal Court Proposal

9.5.1 Constitutional

We have already discussed[65] the obstacle created by Section 96 of the *Constitution Act*, 1867: the exclusive federal power to appoint superior court judges prevents provincial appointees hearing anything traditionally within superior court jurisdiction except in certain narrow circumstances. Just as we saw in the family law area, complete criminal law jurisdiction cannot be exercised by a provincially appointed judge.[66] However, it can be exercised by a federally appointed judge. Therefore, just as in family law, the options are:

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[65] *See Family Law (section 8.1.4).*

[66] *McEvoy v. A. G. of N. B. and A. G. Canada, (1989) 4 C.C.C. (3d) 289 (S.C.C.).*

(a) divided jurisdiction (status quo);

(b) constitutional amendment; or

(c) complete jurisdiction in a federally appointed judge.

Proponents of the unified criminal court reject the first option as undesirable and the second option as impractical.

We believe (as does the L.R.C.C.) that the third option can be achieved under the present constitutional arrangements.

9.5.2 Appointments

The L.R.C.C. assumed that provincial governments would be unwilling to give up the significant number of judicial appointments the criminal courts involve. That is, a unified criminal court and a unified family court, both composed of federally appointed judges, would effectively eliminate the power of provincial governments to appoint judges.

The Task Force is not aware of any statement by a provincial government to this effect. In fact, the strongest proponents of the unified criminal court are provincial governments. When the Attorneys General for Ontario and New Brunswick addressed the Task Force, they both expressed a willingness to allow the federal government unilateral appointment powers rather than stand in the way of the unified criminal court. Of course, not all provincial governments have given such assurances and it may be that some have objections but are unwilling to state them publicly.

Regardless of whether the appointment problem is real or illusory, the L.R.C.C. suggests several methods by which the provinces can participate in the process. We do not think it is necessary to comment on the relative merits of each. It is only necessary for us to note that the practical, political problems of making appointments, if they exist, can be overcome and therefore do not stand in the way of the unified criminal court concept.

9.5.3 Salaries

The federal government may not wish to assume total responsibility for salaries of the unified criminal court judges, many of whom, in the early years, may be former judges of the Provincial Court. It may insist on a shared financial responsibility. Any shared cost agreement would have to satisfy Section 100 of the *Constitution Act*, 1867, which requires that superior court judges be paid by Parliament.

9.5.4 Appeals and Review

Elimination of a "superior" court exercising supervisory functions over an "inferior" court would require that the appeal process and the power to grant extraordinary remedies be restructured.

The L.R.C.C. recognized this but did not offer any suggestions. However, the Ontario Court Reform Task Force has made several proposals including the following:

(1) Confer extraordinary remedies jurisdiction on three judge panels of the unified trial court. Urgent cases could be heard by one Court of Appeal judge in Toronto. In either case, an appeal to a panel of the Court of Appeal would lie as of right.

(2) Summary conviction appeals could be heard by single judges of the Court of Appeal sitting on a regular basis in the region where the matter arose. The Chief Justice could assemble larger panels to hear particularly sensitive or important cases.

(3) Bail orders made by justices of the peace could be reviewed by a judge of the unified criminal court. Bail orders made by judges would be

reviewed by a three-judge panel of the unified criminal court, sitting in the region where the matter arose.

However, there is concern with the impact of these proposals on stare decisis. If the summary conviction appeal process suggested by the Ontario Law Reform Task Force were adopted, would the judges of the unified criminal court regard decisions of a single Court of Appeal judge as binding as decisions of a panel of judges? The effect these proposals would have on the volume of cases for the Court of Appeal is also of concern.

9.5.5 Preliminaries

Some defence lawyers who spoke to us share the concern of practitioners in Ontario that preliminary inquiries might be abolished if a unified criminal court is established.

9.5.6 Need for Delegation

Perhaps the principle rationale for the unified criminal court is the belief that there should be only one level of justice, that is, there should not be a hierarchy of trial courts. Whether there should be a hierarchy of courts or not, there is a hierarchy of work. Some cases are more complex or difficult than others. Some cases are more important than others if only by reason of the consequences of conviction. Some cases are of greater public interest in terms of the principles of law that flow from them.

Some proponents of the unified criminal court speak of the right of every accused to be heard by a superior court judge regardless of the nature of the charge. This may be impractical. The present court structure is an attempt to deal with the hierarchy of work. While it may not be a very successful attempt, some form of hierarchy may be required.

The desirability of functionally separating longer or more complex cases or procedures from simpler ones has been cited in Ontario as a problem that will either result in the creation of separate divisions of the same court (Zuber Report) or the delegation of judicial functions such as bail hearings, summary conviction trials and preliminary inquiries to justices of the peace. Both of these consequences are inconsistent with the elimination of apparent levels of justice. In Nova Scotia justices of the peace do not currently perform any of these functions except bail hearings. A unified criminal court might provoke a campaign to delegate to justices of the peace all the high volume, uncomplicated matters; municipal bylaw violations; minor federal statute violations, etc., currently heard by Provincial Court judges.

But, even if one accepts that varying importance and complexity of work requires some hierarchy, this does not mean it must be a structural hierarchy or that a better structure can't be found.

9.5.7 Competence of Lower Court Judges

The Zuber Report questioned whether the lower court judges of Ontario were competent to perform the functions of a superior court judge. We do not find this a compelling objection. It should not be assumed that all existing Provincial Court judges would be appointed to the new unified criminal court. If a unified criminal court is created, the Task Force believes that Provincial Court judges should follow the same procedure we propose for the Family Court judges who wish to join the Family Division of the Supreme Court. This means all Provincial Court judges who wish to become members of the new court would apply for appointments and be screened by the federal judicial appointments review process. Given their experience as Provincial Court judges, there is every reason to be optimistic about appointments to the Supreme Court from among their ranks.

9.5.8 The Impact on Court Facilities and Personnel

Most court houses in Nova Scotia can accommodate both jury and non-jury trials but there are some Provincial Court facilities that are not designed for jury trials. The Dartmouth and Spring Garden Road court facilities are examples. The L.R.C.C. says:

> *"There would be some dislocation of personnel and a variety of logistical problems relating to the availability and use of court facilities. Some new facilities may have to be built and existing facilities may have to be modified (for example, to permit space for jurors). However, the existence of a unified court would not necessarily involve complete centralization of court resources and administration. A better managed criminal court system could, in fact, result in more flexibility in the placement of courts in the community. Nor would it be necessary for all judges to be placed in one courthouse. The existing facilities used by the other levels of criminal courts would continue to be utilized. Better management of criminal cases could result in a more rational use of available space. When one court is suffering a backlog, extra judges could be assigned from other regions to make use of courtrooms that would otherwise be vacant. While creation of a unified court would involve a considerable reallocation of physical and human resources, the rewards in terms of efficiency are potentially great."*[67]

We do not think facilities are a major impediment to a unified criminal court.

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[67] *At p. 26.*

9.5.9 Size of the Court

If a Family Division were to be created at the Supreme Court level, the County Court merged with the Trial Division of the Supreme Court and a unified criminal court created, the result could be a court of as many as 71 justices. Some argue that this would create serious judicial management problems. Quite clearly there would be a need to provide a greater degree of management control. But we don't think additional judicial management is a bad thing and in this instance it would be required to optimize the advantages of unification, not overcome difficulties created by it.

9.5.10 Hierarchy, Status and Morale Problems

Those who oppose the creation of a unified criminal court point out that the problems related to the perception of the Provincial Court as an inferior court are status problems. They contend that such problems can be addressed through public education and provincial government attitude and commitment to the Provincial Court.

In large part, it is the status of the Provincial Court which is the problem. This results from such things as:

(a) substandard court facilities;

(b) the fact that counsel gown before the Supreme and County Court judges but not the Provincial Court; and

(c) judicial salary disparity.

These problems can be addressed without changing the court structure. If they were addressed, judicial morale would undoubtedly be improved.

9.5.11 No Precedent

There is no Canadian precedent for a unified criminal court. New Brunswick attempted a unified criminal court at the provincial level but it was struck down as unconstitutional. The previous government in Ontario planned to institute one in the second phase of its court restructuring plan. There is considerable opposition to this on the ground that phase one will require a lengthy period of adjustment and assessment before the next, more radical step is taken.

9.6 Analysis of Unified Criminal Court

The unified criminal court is only worthwhile if it solves more, bigger problems than it creates and does it better then any alternative. We weighed the ambitions of the proposal against the potential problems set forth in section 9.5.

9.6.1 Questions

The unified criminal court is intended to address three problems with the current Criminal Court system: (1) complexity; (2) delay; and (3) hierarchy.

In our analysis of the proposal we attempted to answer five questions:

(1) Are these real problems?

(2) Are they worth solving?

(3) Will the proposal solve them?

(4) Will the proposal create bigger problems?

(5) Are there better alternatives?

On a theoretical level these questions were easy to answer. These problems exist and they are worth solving. The unified criminal court solves the problems and there are no better alternatives. When we examine some of the practical concerns, we began to wonder about the problems the proposal might create.

We outline a few of our concerns below. We deal with the administrative matters of complexity and delay first and then turn to the more theoretical question of hierarchy.

9.6.2 Complexity and Delay

The unified criminal court proposal certainly addresses complexity and delay. In theory at least, it significantly simplifies the criminal courts and, for this reason alone, should make them more efficient and less confusing to the public. We support these aims. However, we are concerned that the proposal may create its own complexities. We worry that the solutions offered to the problems of appeals, review and preliminaries will, taken together, be just as confusing as the current multi-court structure. We are not convinced, for example, that the average Nova Scotian will find preliminary hearings and trials before different judges of the same court appreciably better than before judges of different courts. It may be simpler for the lawyers and judges but one of the main goals of the unified criminal court is simplification for the public.

The unified criminal court will speed the criminal process. However, if speed is desirable, there are other methods of achieving it. Docket management can be improved by technology and administrative unification.[68] If there are too many re-elections and preliminary inquiries they can be cut back or curtailed - if people truly want speed. In fact much of the opposition to the unified criminal court proposal appears to spring from a suspicion that elimination of preliminaries and re-elections is part of a "hidden agenda".

We do not subscribe to the conspiracy theory. We believe that re-elections and preliminaries will stand or fall on their own merits. The unified criminal court may intensify scrutiny of them and almost certainly would reduce the delay each causes at present by improving court management.[69] But, we wonder whether unification of the court is the main reason for expected improvements. Is it the "active ingredient"? Will the process be more efficient because the court is unified or because the administration of the courts is unified? Setting aside all other concerns (and assuming, as we do, that administrative unification can work without court unification), if a unified court were only marginally better than two courts with common administrative support, court unification would not be worth the extra trouble. Practical experience will demonstrate whether an unified court is appreciably more efficient than two courts with a single administration.

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[68] *See Chapter 23.*

[69] *Paradoxically, if the objection to preliminaries and re-elections is the inordinate delay they engender, the unified criminal court might reduce pressure for their elimination by reducing their disruptive effect. Of course this is no consolation to those few who feel they benefit from delay. But they will oppose any reform.*

Proponents of the unified criminal court argue that the civil courts are (or are about to be) unified and that therefore the criminal court should be unified too. This is a significant point but civil laws are not nearly as technical as criminal law. Efficiencies brought about through structural simplification of criminal courts will be lost if they result in further procedural elaboration.

In theory, the unified criminal court offers significant opportunities for reduction of complexity and delay but one or more pilot projects in Canada is required to determine whether it can fulfil its theoretical promise. We note that the Attorneys General of the provinces and territories passed a resolution at their June 1990 meeting urging the Federal Government to co-operate with them in the establishment of one or more pilot unified criminal courts. We support this proposal and urge its speedy implementation.

9.6.3 Hierarchy

Over the course of our year of work we were surprised to find that the apparent hierarchy of the courts is principally of concern to lawyers and judges (and probably because they think it is of concern to the public). The lay people we spoke to seemed to have little or no concern about hierarchy. Their frustration was with confusion, complexity and delay, not levels of courts.

This should not be surprising. People are used to hierarchical divisions of tasks in virtually every complex area of human activity. It does not offend them to find it in the legal system. They want to know where to go and they want service when they get there. This admittedly unscientific finding suggests that a hierarchy per se is not objectionable.

We identified three types of hierarchy in the courts: status, function and operation.

9.6.4 Status

Certainly nothing is as likely to eliminate the pretensions of status that surround separate courts as merging them.

Having said that however, and given that most of the apparent hierarchy of status can be eliminated through a number of more modest initiatives, is unification justified if it is just to eliminate every vestige of the appearance of differential status? We don't think the problem is that great and, to the extent it is a problem, we think it can be addressed satisfactorily without unification.

If there were no other reason for the unified criminal court we would not support it simply as a means of eliminating status differentials. We say this despite our desire to see differential status eliminated or at least narrowed appreciably.

9.6.5 Function

Functional hierarchy is a different matter. By functional hierarchy we mean the division of work whether it be between courts; judges of the same court; or judges and non-judges.

A significant number of matters in the criminal process are of a routine nature. We don't think judges should spend a great deal of time handling issues requiring little thought and less discretion. Court time is expensive. If judges have time for a lot of this kind of work, we have too many judges. As a rule, judges' time should be dedicated to tasks that only judges can perform.[70]

We do not accept the proposition that every justiciable matter must be heard by a superior court judge. Some form of functional hierarchy is desirable.

The first difficulty is separating matters that are significant or complex enough to require a superior court judge from those that aren't. The second, is knowing what to do with "those that aren't".

The lack of a well defined method of dealing with routine matters under the unified criminal court proposal remains a significant practical problem. Even in Ontario, which has been seen as a bastion of unified criminal court support, there is recognition of a need for delegation of certain routine functions to justices of the peace.

9.6.6 Operation

When we speak of an operational hierarchy we refer chiefly to appeals and review; situations where one or more judges can overturn another judge's decision. Operational hierarchies are required as long as we think appeal and review should be part of our criminal justice system. The unified criminal court will not do away with them, in fact, it may complicate them and create perceptual problems.

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[70] *This approach is reflected in Family Law (Chapter 8) and Justices of the Peace (Section 10.3.1). We do not attempt a list of tasks that only judges can perform. Any list will change over time. It is sufficient for our purposes to say they are tasks that it is both practical and desirable to reserve to a person having the personal and professional qualities expected of a judge and enjoying the requisite independence.*

9.6.7 Conclusions

In summary, we conclude that the unified criminal court has the greatest potential to address problems of complexity, delay and hierarchy. However, we are concerned that the implementation of the proposal will create its own complexities. Further, some form of hierarchy is required. The present construction of the criminal courts is an attempt to deal with functional and operational hierarchies. In the process it creates undesirable status differences that probably have little or no foundation in fact. However, the unified criminal court is not the only way to deal with status differentials. Only if elimination of every vestige of status differential between judges is the overriding concern of court reform should the unified criminal court be seen as the only option. We do not see this as the overriding concern of court reform. Elimination of status is important to us but not to the exclusion of all other considerations.

We don't think operational and functional hierarchies ought to be abolished. We do not support a form of the unified criminal court that would abolished them.

The Constitution, the competence of Provincial Court judges, salaries, facilities, appointments and size of an unified criminal court may present difficulties but they are not significant obstacles. If the proposal proves itself in the pilot projects, they can and should be dealt with.

While we do not embrace the unified criminal court uncritically, it has enormous potential to do good and it is the most promising proposal abroad today. The test will be the practical experience of dealing with appeals, reviews and routine matters.

9.7 Another Option - The Quebec Model

The Task Force also assessed the two-tiered "Quebec model" as a possible option. To reach this system in Nova Scotia, all criminal trial jurisdiction of the County Court would be transferred to the Provincial Court. The result would be that the Provincial Court would have jurisdiction to try all offences tried by a judge without a jury.

The L.R.C.C. set out the following advantages of the Quebec model:

> *"First, it elevates the status of the (provincial court). It effectively removes the distinction between "provincial court judge" and "judge" at*

> *least for the purposes of a trial without a jury. Second, it reduces confusion by creating a clear functional distinction between the levels of Court... Third, it eliminates some sources of delay."*[71]

The L.R.C.C. also points out that this model is compatible with a further change to a unified criminal court and the reclassification of offences proposed in their Working Paper #54.

In addition, the Quebec model would not require any renovations to the present provincial court facilities to accommodate jury trials.

The Quebec model presents a major transitional difficulty for Nova Scotia: there would be additional trial work for the Provincial Court, but all the County Court judges would probably move to the Supreme Court as the result of the merger we recommend. Only the civil portion of the County Court workload would be added to the Supreme Court.

9.8 Conclusions

In theory the unified criminal court model represents the optimal criminal trial court structure. However, due to unanswered questions regarding bail reviews, applications for prerogative writs, summary conviction appeals and, generally, how the system will work in practice, we are not prepared to recommend implementation.

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[71] *At pp. 31-32.*

We do not take these concerns lightly. They should be carefully considered.

No final decision should be made until:

(a) the L.R.C.C. provides an opinion on bail reviews, applications for prerogative writs and summary conviction appeals under the unified criminal court model;

(b) the results of a pilot test of the unified criminal court model are available for assessment.

Recommendation 19

We support the principle of a unified criminal court, but implementation should not take place until at least one pilot project has been established in Canada and assessed and the Law Reform Commission of Canada has provided opinions regarding bail reviews, applications for prerogative writs and summary conviction appeals under a unified criminal court system.

As the Quebec model is a refinement of the two-level trial court, there seems little point adopting it if the unified criminal court is the goal. It would impose a more difficult transition than merger of Supreme and County Courts on the basis we recommend. We believe the focus should remain on the unified criminal court. But, if the unified criminal court proves impractical or unlikely to be implemented for a very long time, consideration should be given to reallocation of jurisdiction between the Provincial Court and the Supreme Court and the Quebec model is an attractive option.

Recommendation 20

The "Quebec model" should not be adopted at this time. However, if no pilot of the unified criminal court is established in Canada within three years, the division of jurisdiction between the Supreme Court and the Provincial Court should be carefully re-examined and the "Quebec model" should be favourably considered among the possible options.

9.9 Provincial Court Status

There is no reason why the Supreme Court and Provincial Court must have separate administrative support. Unification of support services is not contingent upon unification of the courts.

A unified administration is desirable for several reasons, one of which is reduction of status differentials between the two courts. For instance, it will be preferable for the courts to sit at the same physical location. If they do not, the additional work of maintaining satellite locations and transferring data will result in a loss of some of the benefits achieved through unification of the court administration.

This would put all the criminal trial courts under one roof and probably remove the Provincial Court from the places where it sits but which are unacceptable to the Supreme Court. This will reduce access to some degree but not appreciably. On the whole it will be a good thing. There can be little respect for a court which sits in undignified premises.

Inferior court facilities and other court "trappings" contribute to the public perception that the Provincial Court is an inferior court.

Changes should be made to eliminate the basis for a public perception that the Provincial Court and its judiciary are of a lesser status or lower on the hierarchy than the Supreme Court and its judiciary.

To this end:

(a) all criminal trial judges should have the same form of address;

(b) Rules of Court should be the same for similar functions in all criminal trial courts;

(c) all trial courts, in session, should have the same level of courtroom support staff (the minimum required for the efficient functioning of the court).

Other than for functional factors, such as accommodating a jury, there is no reason why the Provincial Court facility should be of lesser quality than the Supreme Court facility.

Recommendation 21

The Government of Nova Scotia should eliminate all basis for a perception of status differences between criminal trial courts by addressing differences regarding judicial forms of address, quality of courtroom facilities, and courtroom support staff.

9.10 Expediting Criminal Trials

9.10.1 Review

We asked our subcommittee to review procedures for expediting trials being tested in the criminal courts of other Canadian provinces to determine which, if any, ought to be adopted in Nova Scotia. The subcommittee reviewed material concerning a "Disclosure Court", a Special Pre Trial (the "Ottawa experiment") and a pilot project run by Judge Lesage in Quebec. They concluded that: (a) the criminal justice system must be able to sift out cases which are not going to trial and eliminate them from the docket as quickly as possible; and (b) for those cases which are proceeding to trial there must be a means of resolving non-contentious issues in order to shorten court time.

9.10.2 Sifting Process

The sifting process has two aspects: identifying the cases which should be sifted out and eliminating these cases from the system.

Two people who can identify cases which should be sifted from the system are the defence lawyer and the Crown attorney. Both must be encouraged to deal with these cases in the early stages of proceedings so they do not form part of the backlog.

There should be a system of file review which requires that the Crown attorney consider whether early resolution of the case should be attempted. This should form part of a post-charge screening program.

Encouraging the defence lawyers and Crown attorneys to identify cases which should be resolved early in the proceedings is only the first step in the sifting process. There must also be a mechanism wherein the two sides can get together and reach a resolution. In Nova Scotia the criminal bar is small. If the Crown obtained the views of victims and contacted the defence lawyers to initiate discussions, there would be as much chance of an early resolution as would occur with any type of formal "special pre-trial" program.

In the case of an unrepresented accused, the Crown should not approach the accused. Instead, the Crown should advise the Court that if the accused had counsel they may be able to shorten the matter. The judge should encourage the accused to obtain counsel.

9.10.3 Shortening Process

Shortening the process requires the defence to make admissions. We are of the opinion that defence counsel who are armed with full disclosure of the Crown's case are more likely to admit non-contentious facts.

In addition to a defence willingness to make admissions, the shortening process requires an opportunity for discussion between the Crown attorney and defence counsel. This discussion can be initiated by counsel or by the court.

Recommendation 22

Crown attorneys should be directed to initiate discussions with defence counsel regarding full disclosure by the Crown and admissions by both parties.

9.10.4 Disclosure

Full, fair and early disclosure of all information pertinent to a defence is of fundamental importance for two reasons. The first - and by far the most important - is to ensure the right of an accused person to know the case to be met so that a full and complete defence can be mounted. The second, less important but nevertheless significant reason, is that early disclosure facilitates case flow management because the accused is confident of having all the material required to make decisions about the case.

The Attorney General of Nova Scotia has required Crown prosecutors to disclose information to the defence since 1980. The Attorney General's Disclosure Guidelines have been broadened and improved over the last decade[72] so that now the policy, as stated, is probably adequate. This does not mean it cannot be improved, simply that we now see this as a matter of evolution and refinement.

However, we feel that disclosure should not be left to the sole discretion of the Attorney General. Our concern is not with the policy itself but rather with the administration of the policy. Currently, the Crown attorney makes the initial decision whether information is of a sort required to be disclosed. If he or she believes it ought not be disclosed, this decision is subject to an internal review by the regional Crown attorney and ultimately by the Director of Public Prosecutions. Only if the defence becomes aware of information that has not been disclosed, can review by an independent third party, usually the presiding judge, take place. The Task Force sees problems with this.

First, in any particular case, the Crown's view of what is required to be disclosed may not be the same as the view of defence counsel. Second, though the police are required by the Solicitor General to comply with the Attorney General's directive, a number of people have expressed doubts about the level of police compliance and ability of Crown and defence to check for noncompliance. Police authorities may not give Crown counsel all the information which they have on file. Third, statements of all witnesses and experts may not be reduced to writing and thus cannot be given to defence counsel. Fourth, Crown attorneys may not be in the best position to balance the sometimes competing interests of the accused and other witnesses. Fifth, there is no external enforcement mechanism or sanction in place to ensure compliance with the disclosure policy.

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[72] *Most recently in February of 1990 as a result of the Marshall Commission recommendations.*

A possible answer to at least some of these concerns is that the Criminal Code of Canada be amended by the Federal Government to legislate a right to disclosure. This was first recommended by the Marshall Commission.[73] The Attorney General of Nova Scotia is participating in a review of this recommendation by the Federal/Provincial/Territorial Ministers responsible for Justice. These deliberations are not yet complete.

The majority of Task Force members are not prepared to recommend legislation. However, we believe that the evolution of disclosure is of concern to all participants in the justice system. We do not think that it should be left solely with the Crown.

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[73] *Recommendation 39.*

Recommendation 23

In order to ensure the continued evolution and maintenance of a suitable mechanism to provide and enforce full disclosure, there should be a standing committee representing defence counsel, Crown attorneys, the R.C.M.P., municipal police forces and lay representatives to study the matter and make recommendations, including the desirability of legislated standards, to the Attorney General from time to time.

Dan Paul dissents from this recommendation and recommends a legislative standard of disclosure be enacted.

10. JUSTICES OF THE PEACE

10.1 History

10.1.1 England

The office of justice of the peace appears to have originated in England in the 14th century when an act of Edward III appointed

> *"one lord and with him three or four of the most worthy in the county, with some learned in the law --- to restrain offenders, rioters and all other barrators and to pursue, arrest, take and chastise them according to their trespasses and offence ... also to hear and determine at the King's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid."* [74]

The office in England was voluntary and unpaid. Over time the office of justice of the peace acquired supervisory control of certain local matters involving various administrative and judicial functions, including the power to issue warrants and to hear some summary conviction matters.

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[74] *Quoted in Mewett, Report to the Attorney General of Ontario on the Office and Function of the Justices of the Peace in Ontario (1985) at p. 1.*

Frequently justices of the peace sat in court with legally trained judges at Quarter Sessions of the Peace to hear various crimes including both felonies and misdemeanours in front of juries.

10.1.2 Nova Scotia

When Nova Scotia was settled, justices of the peace became men of all work and were members of some of the earliest courts in Nova Scotia. In 1727, for example, three justices of the peace were appointed to sit as a civil court. When Lord Cornwallis established the two courts of judicature in 1749, the General Court and the County Court, members of these courts were justices of the peace. In fact, the first council established to advise Lord Cornwallis appointed themselves justices of the peace for the Province. They heard both criminal and civil actions.

Even in these early years there was a desire to speed up and simplify the judicial process. The civil jurisdiction of the justice of the peace expanded so that by 1841, two justices of the peace were authorized to try cases of debt involving amounts up to ten pounds and all common assaults and batteries.

Many were unhappy with the justices of the peace. Justices were called "a most ignorant and narrow minded set of men" who would "feel less inclined for litigation if they were obliged to pay all fees into the county treasurer".[75] Unlike their English counterparts, Nova Scotia justices of the peace were paid a fee for each document they processed.

10.1.3 Evolution

In 1864 stipendiary magistrates were appointed to preside over the municipal courts. These justices had civil and criminal jurisdiction and were paid a salary over and above their fees. But there was still the concern with the fee system. One Attorney General, for example, subscribed to the general belief that justices and even magistrates, anxious to obtain fees connected with the issue of process in their courts, were disposed to find in favour of the plaintiff.[76]

By 1913 the Bar Society was complaining about the multiple framework of justices, stipendiary magistrates, municipal, city and county courts.[77] In 1938, in an attempt to put the magistracy upon a better basis, it was decided that lawyers of at least three years' standing at the bar (increased to five years in 1955) would be appointed police magistrates, to serve on a full-time basis with adequate salaries.[78] In 1942 the new Police Magistrates were empowered to preside over Municipal Courts whenever the Attorney General required it and in 1945 the title was changed to Provincial Magistrate.

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[75] *Acadian Recorder, March 8, 1862, quoted in Beck, the Government of Nova Scotia (1957) at p. 129.*

[76] *Assembly Debates 1895, page 34.*

[77] *As referred to in Beck, J. M., The Government of Nova Scotia, (Tor. 1957) at p., 296.*

Much of the criminal jurisdiction of the justice of the peace was transferred to the Magistrates. Today we know them as Provincial Court Judges.

In 1980 the civil jurisdiction of justices of the peace was transferred to the newly created Small Claims Court.

10.2 Present Functions of Justices of the Peace

10.2.1 Legislation

Section 2 of the *Justices of the Peace Act* provides:

> *"The Governor in Council may from time to time by commission under the Great Seal of the Province or the seal-at-arms appoint such and so many justices of the peace in and for the Province as the*

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[78] *See Beck, p. 295.*

Governor in Council deems expedient and proper." [79]

Section 8 of the Act gives the Lieutenant Governor in Council the right to remove any justice of the peace he so desires.

10.2.2 Categories

There are about 375 justices of the peace in Nova Scotia. As a group they perform a variety of functions, but the commissions of most justices of the peace are limited in one way or another so that few, if any, individuals can perform all the functions of a justice of the peace.[80]

In Nova Scotia today, a justice of the peace takes oaths and issues court process. In the main, this means swearing informations, taking affidavits and issuing summonses, all relatively straightforward clerical matters.

However, a select group of justices of the peace called designated justices of the peace, is also given authority to sign remands, consent releases, search warrants and warrants for arrest. While still minor compared to the powers of a judge, these are more than mere clerical functions.

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[79] *R.S.N.S. 1989, c. 244.*

[80] *Appendix 6 provides a breakdown by county of current justices of the peace.*

None of the justices of the peace hears criminal cases for the purpose of determining guilt or innocence.

Many justices of the peace are employed by the Attorney General's Department, the Department of Community Services, the City of Halifax, the Police Department of the City of Halifax, the Dartmouth City Police Department, the Town of Bedford, the Public Utilities Board, CFB Halifax, and the Registry of Deeds. Most of these justices are involved in document processing only. The chief clerks of the Provincial Court in each district are the chief designated justices of the peace. There are fifteen such chiefs who are paid an additional amount for their work as justices of the peace over and above their salaries. They either turn their fees over to the Government or don't charge fees.

Qualifications for the office of justice of the peace are set by the Attorney General's Department. There are no educational requirements, but persons selected must be well known and trusted members of the community with no criminal record.

10.3 Issues Considered

10.3.1 Do we need Justices of the Peace?

The first question is: should we continue to use justices of the peace at all? A report on the court structure of Prince Edward Island (1973)[81] suggested that lay persons should not determine issues involving the liberty or rights of citizens but concluded or admitted that there was a need for ready access to persons who can take affidavits and declarations, and verify certain matters and act in support of various types of applications.

In Ontario, Professor Mewett (1981) characterized functions of the justice of the peace as:

(a) adjudicative;

(b) bail processing; and

(c) criminal process issuing (signing informations, issuing search warrants and signing affidavits).[82]

He concluded that justices of the peace are required for two reasons:

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[81] *McKimmie Report.*

[82] *See Mewitt at p. 38-39.*

1. It is essential to have independent persons stand between the individual citizen and the state to determine whether process should issue, whether a search warrant should be granted and on what terms an accused should be heard on bail.

2. If the justices of the peace do not perform the functions currently assigned them, other officials will have to. So, nothing would be gained by abolishing justices of the peace.

It has been argued that justices of the peace are an essential part of our criminal justice system because Provincial Court judges: (1) cannot be available 24 hours a day to issue warrants or summonses, conduct bail hearings, deal with remands or execute a variety of court documents; and (2) should not come into frequent, private contact with the police.

New Brunswick no longer uses justices of the peace. Functions currently carried out by justices of the peace in Nova Scotia are exercised by Provincial Court judges in New Brunswick. Whether this means that one Provincial Court judge is on call at all times within the region or that some documents do not get executed, is not clear to us. We've heard nothing to indicate that New Brunswickers are more apt to languish in jail overnight because the necessary process cannot be obtained.

In light of the New Brunswick situation, it seems that justices of the peace are not a necessary part of the modern criminal justice system, but this does not mean that we should abolish the office. Even if they are not absolutely necessary, they may be desirable, though not as currently organized and trained for their tasks. Given proper training and instruction, they might be used to perform routine non-adjudicative functions. When considering this issue, we were guided by the following principles:

1. Judges are our highest paid public servants and therefore, as a general rule, should be reserved for tasks only they can perform.

2. If there are tasks that need not be performed by a judge or lawyer, they should be performed by a lay person because they are more cost effective and numerous and therefore can be widely distributed throughout the province.

3. A unified criminal court strengthens the case for junior officials.[83]

It seems to us that justices of the peace are desirable for three reasons: (1) they can perform routine, clerical functions more inexpensively than judges; (2) the appearance, at least, of judicial impartiality between state and citizen would be impaired by frequent unilateral contact between the police, Crown attorneys and Provincial Court judges; (3) justices of the peace, being more numerous than Provincial Court judges, can be more readily available, thus expediting the criminal process.

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[83] *This is consistent with our view that not every matter must be dealt with by a superior court judge and that we should do nothing that is inconsistent with creation of a single criminal court.*

It seems to us then that the goal should be to refine and upgrade the office of justice of the peace, not abolish it.

Recommendation 24

We recommend continuation of the office of justice of the peace.

10.3.2 What should Justices of the Peace do?

While we have taken into consideration the view that non legally trained persons should not determine matters that directly affect a citizen's liberty and rights, nearly everything the designated justices of the peace decide does that in some manner. This is clearly the case if the justice of the peace were to decide substantive issues in the process of adjudicating cases and bail hearings. It is less so if they are limited to search warrants and even more limited if justices of the peace are only authorized to take oaths and execute court documents. Obviously the scope given justices of the peace should depend upon the type of person given the job and the training provided. A balance must be struck between the desire for great numbers of justices of the peace (in order to maximize access), and their standards and duties.

Are there quasi-judicial tasks that judges need not perform? We think so. They include: routine bail applications and issuing criminal process (such as taking oaths and declarations), and other functions not requiring a determination of guilt or innocence and which are open to review by a judge. On the civil side, there will be a need for someone to conduct marriages. If the County Court is merged with the Supreme Court, as we recommend, and a Family Division of the Supreme Court created, the number of persons qualified and willing to perform marriages will be very limited. Justices of the peace would seem to be well suited to perform this function.

We do not believe these tasks require a law degree or judge-like independence, but they do require a properly trained person.

Issuance of search warrants, however, requires an independent balancing of the interest of the state against the individual's constitutional right to privacy.[84] We do not think justices of the peace, as currently organized and trained, are sufficiently independent and qualified to satisfy the emerging legal requirements of this task.

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[84] *Hunter et al. v. Southam, Inc., [1984] 2SCR 145.*

The choice is either to give justices of the peace the requisite independence and training or to stop them issuing search warrants.

10.4 Recent Developments in other Provinces

10.4.1 British Columbia

When British Columbia established a Task Force in 1978 to review its courts, a number of municipalities requested a new division of the Provincial Court dedicated to bylaw enforcement. This was rejected in favour of a plan to establish a number of justices of the peace who would try municipal bylaw and traffic cases under provincial legislation.

10.4.2 Ontario

Under the previous Liberal administration, the Ontario Government was a strong advocate of a unified criminal court. At the same time, it moved to upgrade the office of justice of the peace.[85] Recent legislation provides for "presiding" and "non-presiding" justices of the peace. A presiding justice of the peace is one who is authorized to preside at the trial of an offence under an act of the legislature (breach of a provincial statute, regulation or bylaw). Presiding justices of the peace cannot hear:

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[85] *Ontario has long had a more organized approach to the office than Nova Scotia.*

(a) Criminal Code offences;

(b) offences under any other federal statute unless the statute designates a justice of the peace to hear the offence;

(c) preliminary inquiries;

(d) assorted miscellaneous Criminal Code matters.

Non presiding justices of the peace cannot hear:

(a) a matter a presiding justice of the peace cannot hear;

(b) violations of provincial statutes, regulations or bylaws;

(c) guilty pleas under Section 7 of the *Provincial Offences Act* or Sections 9 or 19 of the Act (default convictions);

(d) determination whether a person should be released from or detained in custody (bail hearings);

(e) issuing a warrant to levy a tax toll or dues under the *Public Works Act*, *Lakes and Rivers Improvement Act* and the *Municipal Act*;

(f) determination as to whether anything should be forfeited under certain statutes, such as the *Migratory Birds Convention Act*.

10.5 Problems

10.5.1 Standards of Independence

Even though it is desirable to have justices of the peace as part of our judicial system, there are problems that need to be addressed. If we want justices of the peace to do more than process documents, they must take on at least some of the attributes of an independent and impartial court official standing between the state and the citizen. Section 11 (d) of the Charter indicates that Canadians should be able to rely on independent and impartial judicial authority.

There are several factors that suggest this is not the case in Nova Scotia with regard to justices of the peace. Many are employed by governments or are paid on a fee for service basis. All commissions can be revoked by the Lieutenant Governor in Council at pleasure.[86] They lack any formal legal training[87] and they often rely upon the Crown attorney or the police for legal advice.

In the Valente decision,[88] Supreme Court of Canada lays down criteria for judicial independence. Although the court was concerned with the independence of Provincial Court judges rather than justices of the peace, we believe the criteria attach to the function performed, not the office of the person performing it. Thus, as an example, if justices of the peace perform substantive adjudicative functions, they should have tenure of office to the extent that they could not be dismissed without a hearing before a neutral authority. A fee for service does not provide sufficient financial security and could influence a justice of the peace to maintain a high volume of work at the expense of careful consideration of the issues.

In short, there is a direct relationship between the tasks given justices of the peace and the degree of upgrading required.

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[86] *Section 8 of the Nova Scotia Act.*

[87] *In Nova Scotia, the lack of adequate training and education is exaserbated by the lack of an up-to-date handbook for justices of the peace. The existing handbook, while excellent in its detailed discussion of the various justice of the peace functions, says nothing about the Charter of Rights and Freedoms and other legal developments of the last decade for the simple reason that it is more than ten years old.*

[88] *(1985) 24 DLR 4th 161.*

Admittedly, in Currie v. Niagara Escarpment Commission,[89] the Ontario Court of Appeal declared:

1. Although justices of the peace did not enjoy the security of tenure of federally appointed judges, neither did the Provincial Court judges who were also appointed by the Lieutenant Governor in Council. The Court of Appeal also declared that it was not mandatory that a justice of the peace be given an opportunity to be heard by a neutral authority before removal. The requirement of the oath of office, the existence of the Review Council for justices of the peace (in Ontario) and their tradition of the common law of judicial independence, meant that "the informed, reasonable and fair minded person ... would conclude that the right to appoint at pleasure was so qualified that the independence of the justice of the peace was not impaired."

2. As to undue administrative control by Ontario's Ministry of the Attorney General, Justice McKinnon held that it was actually judges of the Provincial Court who exerted much of the control over justices of the peace in Ontario. Justice McKinnon saw nothing wrong with Crown attorneys advising Justices on legal matters. (In this regard, Professor Mewett agrees with him.)

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[89] *(1984) 13 C.C.C. (3d) 35 (Ont. H.C.).*

3. The fee for service payment did pose difficulties because police officers could select a friendly justice of the peace for the process sought. This selection might depend upon the degree of cooperation to be expected from the justice of the peace and there would be a financial reward for the justice of the peace to give the police what they wanted. This was remedied in Ontario by an amendment that placed justices on a duty roster so as to eliminate any favouritism by the police.

10.5.2 Current Situation

If we compare Ontario with Nova Scotia justices of the peace, we notice several differences:

1. Nova Scotia Provincial Court judges do not direct the justices of the peace in any formal or informal sense. Justices of the peace do, on occasion, request advice from Crown attorneys. The degree of administrative direction from the Attorney General's Department seems greater than in Ontario.

2. There is no independent review process that determines when the commission of a justice of the peace is to terminate.

3. There is no duty roster requirement to prevent justice of the peace shopping by the police outside of Halifax.

If justices of the peace are to perform adjudicative functions, these practices must be changed at the very least. However, this may not be enough. Justice LeDain in Valente seems to impose a higher standard than the Ontario Court of Appeal. Commenting upon the requirements of Section 11 (d) of the Charter, Justice LeDain declared:

> *"...the essentials of security of tenure for the purposes of Section 11 (d) of the Charter, is that the Judge be removable only for cause and that the cause be subject to independent review and determination by a process at which the Judge affected is afforded a full opportunity to be heard. The essence of security of tenure for Section 11 (d) is a tenure, whether until age or retirement, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner."*[90]

In addition, Justice LeDain expressed concern with a fee for service salary arrangement insofar as this affected financial security.

While it might be expected that a lower standard of independence is acceptable for justices of the peace than for judges, the Criminal Code does not seem to distinguish between Provincial Court judges and justices of the peace. If justices of the peace are going to be called upon to perform some of the functions of Provincial Court judges, the same standard ought to apply.[91]

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[90] *At p. 179.*

10.5.3 Conclusions

The present system of employment of justices of the peace in Nova Scotia does not meet either the Currie or Valente standards of independence and impartiality. A combination of inadequate training and direction, and a system that allows police to select justices of the peace of their choice (at least outside of Halifax), as well as an absolute control over tenure of office by the government of the day raises serious questions about the competence, independence and impartiality of justices of the peace in Nova Scotia. Therefore, some upgrading is clearly required. The degree will depend on the nature of the tasks given justices of the peace, but certain, basic improvements are needed regardless.

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[91] *The Court of Queens Bench in Alberta recently held that the requirements for independence and impartiality for justices of the peace must be close to those expressed in Valente, particularly when a justice of the peace is performing a judicial function. In this case a search warrant issued by the justice of the peace was ruled invalid because a reasonable person, fully aware of the facts, would not conclude that the justice of the peace was independent and impartial given that Alberta justices of the peace could be removed from office at pleasure, without any consideration by an independent body (Magee [1988] 3WWR169).*

Justices of the peace require more and better training. They need an updated practice manual, regular education seminars for newly appointed justices of the peace, and a program of continuing education.

There is a need for more supervisory control of the justices of the peace, but it should come from outside the Attorney General's Department. There is no suggestion that the Attorney General's Department ever attempted to improperly influence a justice of the peace. In fact, if there is any complaint, it is that the Department has neglected justices of the peace, not meddled with them. But, even though there is no actual interference with their independence, the public perception brought on by such a relationship is something that has to be considered. A more appropriate supervisor would be a judge of the Provincial Court. We agreed with Professor Mewett that there should be one judge of the Provincial Court appointed as an Associate Chief Judge to supervise justices of the peace.

A better selection and dismissal process is required. Vacancies ought to be advertised and appointments made by the Governor in Council only after consultation with the Chief Judge of the Provincial Court or the Associate Chief Judge designated to supervise justices of the peace.

It is questionable whether we need as many justices of the peace as we have. The needs of each area should be assessed and the appropriate number of justices of the peace appointed accordingly. Needs should be reviewed periodically.

It is doubtful we could afford to make all existing justices of the peace full-time employees even if we wanted to, so we will have to keep people on a fee for service basis, but institute some kind of rotation system in order to avoid any suggestion of police influence and to comply with Charter requirements.

Chief Court Clerks can continue as non-presiding justices of the peace as long as they can perform both functions adequately.

Recommendation 25

The Provincial Government should provide justices of the peace with an updated practice manual, training seminars for newly appointed justices of the peace, and a continuing education program.

Recommendation 26

Greater supervisory control should be established over justices of the peace. This control should be exercised by a judge of the Provincial

Court. One judge of that court should be appointed as an associate chief judge responsible for justices of the peace.

Recommendation 27

There should be fewer justices of the peace and they ought to be distributed as needed. Vacancies ought to be advertised and appointments made by the Governor in Council on the basis of merit after consultation with the Chief Judge of the Provincial Court or the Associate Chief Judge responsible for justices of the peace.

Recommendation 28

Since most justices of the peace will continue to serve on a fee for service basis, some kind of rotation system is needed in order to avoid any suggestion of police influence and to comply with Charter requirements of independence. If "presiding" justices of the peace are appointed, they should be paid as Small Claims Court adjudicators are now paid.

Recommendation 29

Justices of the peace should be authorized to conduct civil marriages.

Recommendation 30

The Governor in Council can continue to appoint public servants as justices of the peace as long as their commissions limit them to non-adjudicative tasks and they can function effectively.

10.5.4 Search Warrants

On balance we think it is preferable not to have justices of the peace issue search warrants. Provincial Court judges issue search warrants in New Brunswick and judicial supervision in the form of prerogative remedies is provided by their Court of Queen's Bench. We are told by justice officials in New Brunswick that this works well. We are not aware of any reason why this could not work just as well here.

It seems wasteful to upgrade justices of the peace to a level of independence simply to continue to issue search warrants. It also defeats the goal of having numerous people capable of performing routine tasks distributed throughout the province.

Recommendation 31

The practice of justices of the peace issuing search warrants should cease. Search warrants should be the responsibility of Provincial Court judges.

10.5.5 Presiding Justices of the Peace

Likewise, we do not think that justices of the peace should hear contested minor provincial offences such as traffic violations or municipal bylaw cases. We think the present complement of Provincial Court judges is sufficient to handle all penal matters, except those within the exclusive jurisdiction of the Supreme Court, once a proper system of workload allocation is established.

We also believe that resources required to upgrade the justices of the peace to the point where they can adjudicate even minor cases are better spent on further improvements to the Provincial Court. Once again, of course, we run up against a lack of statistical data. We don't know how long Provincial Court judges actually sit in each location, so we can't measure the workload to determine if there are enough of them and how well the work is distributed. We are left to anecdote. Anecdote suggests that some work very hard while others do not. If true, this justifies better management, not more adjudicators.

Recommendation 32

On the basis of present information, justices of the peace should not be upgraded to hear contested minor provincial traffic offences or municipal bylaw violations.

However, if new factual data proves us wrong, or if the government decides, once proper workload management systems are in place, more adjudicators are required on an occasional basis, we offer several alternatives for consideration:

(a) upgrade some of the present justices of the peace;

(b) appoint supernumerary Provincial Court judges; or

(c) appoint members of the private bar to sit as "presiding" justices of the peace.

In the latter case, the legally trained "presiding" justice of the peace could adjudicate simple, contested municipal bylaw offences in much the same manner as private lawyers sit as Small Claims Court adjudicators and Assessment Appeal Court judges.

These legally trained justices of the peace could be gradually introduced rather than appoint additional Provincial Court judges. This would produce overall savings and speed criminal trials to some extent by removing competing municipal bylaw cases. At the same time the adjudicating justices of the peace could sit in municipal chambers, relieving the strain that exists in certain court facilities.

These presiding justices of the peace should be appointed and paid a per diem by the Provincial Government so that they will not be dependent on the municipal council as it is unlikely they will be appointed for terms greater than three years and the municipality will receive fines. This proposal would be generally in line with recent changes in Ontario and British Columbia except our justices would not be given jurisdiction over provincial offences. In our view, the degree of separation required to achieve independence of the Provincial Government is too great and too costly to justify the exercise.

We are impressed with the work of the Small Claims adjudicators and their method of appointment. We think presiding justices of the peace could be modeled on them.

The use of supernumerary judges under the direction of the Chief Judge is a good way to deal with backlogs and emergencies in particular locales,[92] but supernumeraries should not be used to deal with the base-load of cases.

Recommendation 33

If factual data shows the need for additional adjudicative personnel, legally trained individuals with three years' experience at the bar should be appointed as "presiding" justices of the peace to hear contested matters not involving the Crown, such as municipal bylaw violations.

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[92] *Cases would be assigned them by the Chief Judge where (1) there is a backlog that is significantly greater than the provincial average, and (2) other judges are not available to reduce it.*

11. HALIFAX CITY COURT

11.1 Introduction

11.1.1 Only Municipal Court

The Halifax City Court is the last remaining municipal court in Nova Scotia. It is housed in the old court house on Spring Garden Road and is presided over by three Provincial Court judges. They use three courtrooms and the administrative staff is provided by the City and are therefore City employees. The fourth courtroom is occupied by another Provincial Court judge with the administrative staff provided by the Province.

11.1.2 Functions

The City Court is a court of record for the trial of offences against the laws of Canada or the Province, as well as violations of Halifax City Ordinances. The Court hears Criminal Code violations as well as violations of other provincial and federal statutes that occur within the city (although this is not clearly stated in the City Charter) as well as breaches of ordinances.

Three Provincial Court judges handle Criminal Code offences and young offenders between the ages of 16 and 18 in relation to offences committed within the boundaries of the city. The fourth Provincial Court judge handles non-city, R.C.M.P. matters in the west side of Halifax County, some Federal Fisheries cases, and also City of Halifax incidents involving motor vehicle violations and ordinance (bylaw) offences. In 1989 the City Court handled 2,351 cases involving violations of the Criminal Code, 103 violations of other federal statutes, 4,326 violations of provincial statutes (primarily motor vehicle moving violations) and 3,449 municipal ordinance violations.[93]

The City Court theoretically also has a civil jurisdiction where the defendant resides in the city or the cause of action arose in the County of Halifax in cases of debt or contract and tort not involving title or right to possession to a maximum of $500.00. However, this civil jurisdiction is not exercised and all civil actions within the above monetary limits are heard by the Small Claims Court.

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[93] *See Appendix 7.*

11.1.3 Provincial Take-Over

Proposals have been made over the years that the Province take over the City Court. It is argued that this is necessary in order to simplify and consolidate court administration and to allow for the more effective allocation of available resources.

The City, however, wishes to retain administration of the Halifax City Court because it fears:

(a) that ordinance enforcement will not be dealt with as effectively as is now the case;

(b) there will be less cooperation between the courts and City administration than there is now;

(c) that judicial productivity will drop if the court is made part of the Provincial Court system; and

(d) their court employees will not be well treated in the Provincial Civil Service.

11.2 Historical Background

11.2.1 1815 to 1866

Halifax obtained jurisdiction over criminal matters as far back as 1815 when a Halifax Police Court was created. It was staffed by a salaried and legally trained justice of the peace who presided over a court that was held daily.[94]

In 1817 legislation authorized the establishment of a Commissioners Court within each county or district in Nova Scotia for the summary trial of civil actions where the claim in debt was not over ten pounds and in tort not over five pounds. Such a court was established in Halifax in the same year.[95]

In 1841 the first Charter of the City of Halifax transferred the judicial functions of the Police Court to the newly elected members of the local government, namely the Mayor and his council.[96] The Commissioners Court was also abolished and its powers vested in the new court, known as the City or Mayor's Court. Apparently, the Mayor and Aldermen presided over this court as well.

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[94] *Oxner, "The Evolution of the Lower Court of Nova Scotia in Law in a Colonial Society: The Nova Scotia Experience." (Yogis, ed.), 1984, Toronto, Carswell. Stats. N.S. (1815) c. 9.*

[95] *Stats. N.S. (1817) c. 11.*

[96] *Stats. N.S. (1841) c. 55.*

11.2.2 1867 to 1967

In 1867 the judicial functions of the Mayor and Aldermen (Council) in the Mayor's Court were transferred to a Stipendiary Magistrate.[97]

When the *Towns Incorporation Act* was passed in 1886 or 1888,[98] provision was made for the establishment of municipal courts to be presided over by Stipendiary Magistrates in which the trial of civil actions under $80.00 could take place. The *Municipal Court Act*[99] declares that:

> *"Every incorporated town shall have a court of law and record to be called the Municipal Court."*

Several towns established their own Municipal Courts as a result of this legislation.

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[97] *Stats. N. S. (1867) c. 82.*

[98] *Stats. N. S. (1888) c. 1.*

[99] *Revised Statutes of Nova Scotia 1900, Chapter 159, Section 3.*

11.2.3 1967 to Present

By 1967 there were only two Municipal Courts operating in Nova Scotia, one in Sydney and one in Halifax. The *Justices Courts Act*[100] gave civil jurisdiction to justices of the peace to a maximum of $80.00 (two justices of the peace) or $20.00 (one justice of the peace). However, their jurisdiction did not extend to defendants residing in a city or in an incorporated town or to cases where the debt arose there. Stipendiary Magistrates were given the power of two justices of the peace and could exercise their powers anywhere in the Province, except where the City Court of Halifax or the City Court of Sydney had jurisdiction, to hear and determine the case.

The City Court of Sydney was taken over by the Province some years ago.

In 1980 the *Small Claims Court Act* repealed the *Justices Courts Act* and transferred the civil jurisdiction of justices of the peace and Stipendiary Magistrates to the new Small Claims Court. However, the civil jurisdiction of the Halifax City Court was preserved.

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[100] *Revised Statutes of Nova Scotia 1967, Chapter 158.*

11.3 Discussion

11.3.1 Current Problems

The City Court in Halifax has a long history and it is clear that cities like Halifax have particular problems that have to be considered. Statistical evidence demonstrates the large volume of cases that have to be handled involving not only violations of the Criminal Code but also breaches of City ordinances and traffic related offences. The question is, how can the needs of the City of Halifax be effectively met and at the same time the court structure simplified so as to provide efficient court administration? The City's first choice is to retain the City Court as a separate court, thus protecting City employees and making sure that the City's special problems are dealt with in its own courts.

The statistical reporting problem could be resolved by including the City Court in the data reporting system. Right now it isn't and the reason is instructive: the costs of automating the court to bring it in line with the rest of the Provincial Court could be up to $500,000. Why should the City pay so much to fill out the Province's data and why should the Province - with the Supreme and County Courts yet to be automated - pay to bring the City's court on line?

The City would like the Province to increase its financial contribution to court administration costs. This would still leave a situation where there is dual court administration within the same building, a fact which seems to produce its own frustrations as well as being more expensive. Takeover of the City Court by the Provincial Court would provide an integrated administrative process and integrated personnel as well as data collection consolidation.

11.3.2 City Concerns

In any takeover, steps should be taken to deal with the City's concern about prompt and effective bylaw ordinance enforcement. Certainly Halifax is not the only municipality with these concerns. Our proposals regarding justices of the peace may offer some comfort in that regard.

The City of Halifax has, in the past, made a number of suggestions for changes in the procedure that could make the present court system more efficient. These concern the problem of unpaid parking tickets and the nonappearance of an accused in motor vehicle matters. The proposals outline a procedure involving a new type of summons that would avoid the necessity of laying an information and having a summons issued and served upon the owner of the offending vehicle. It is anticipated that such a system would remove the vast majority of parking violation offences from the docket of the Provincial Court and avoid the need for ex parte trials.

Similarly, a new procedure proposed by the City would do away with the need for ex parte trials or the issuing of a warrant in the case of the nonappearance by an accused to a ticket summons in motor vehicle matters. Since there is present authority which permits the entry of a conviction, upon a failure to appear for arraignment in the case of a moving violation, there does not seem to be any reason why the same authority should not be given in the case of an accused who fails to appear at trial.

11.4 Conclusions

The advantages to be gained by eliminating the City Court in terms of uniformity and efficiency of administration outweigh, in our opinion, the advantages of retaining the Court as a separate entity. However, we appreciate the special needs of the City in relation to efficient bylaw enforcement and parking violations. Rather than create a new and distinct Summary Conviction Court presided over by a Justice of the Peace, we are of the view that the City's procedural suggestions for improvement ought to be instituted. They seem fair and they streamline the present process. These improvements would help all municipalities.

Recommendation 34

The Halifax City Court should be abolished and the administration of the court be brought under Provincial control.

Recommendation 35

Procedures for enforcement of motor vehicle moving and parking violations should be amended to allow ex parte convictions where the accused fails to appear.

Recommendation 36

The present staff of the City Court should be integrated into the Provincial Civil Service without detriment to them.

12. NATIVE JUSTICE

12.1 Introduction

Since the report of the Royal Commission into the Donald Marshall Jr. Prosecution, "Native" and "Justice" have been closely associated in the public mind. Some Native leaders call for a separate justice system while others seek many of the same things that women, victims and other minorities demand of the existing system: sensitivity and effectiveness.

The job of the Task Force is to make suggestions regarding the structure of the courts - a significant part of the justice system, but by no means the whole system. To the extent that a rational court structure contributes to a sensitive and effective justice system, we deal with the concerns of Natives when we deal with the public concerns generally. But the issue of whether there ought to be a separate Native justice system is a political and legal question that is completely beyond our mandate and expertise. If a decision had already been taken to have a separate Native justice system, our Task Force might have been asked to offer suggestions as to how it could be structured, but no such decision has been taken.

Accordingly, we had assumed that we would say little or nothing about native justice issues. However, in Sydney we were addressed by Sakej

Henderson, speaking on behalf of Grand Captain Alexander Denny of the Sante Mawiomi wjit Mikmaq (commonly known as the Grand Council of the Micmac).

12.2 Grand Council Recommendations

12.2.1 Practical Agreements

Grand Captain Denny makes seven recommendations, including Provincial and Family court sittings at Eskasoni and Indian Brook Reserves, a court worker program, and recovery of all litigation expenses associated with vindication of treaty and aboriginal rights.

According to Mr. Henderson, these recommendations are predicated on a belief that it is better to work on practical agreements at this time than to wait for the resolution of all outstanding theoretical issues.

The Task Force welcomes the Grand Captain's practical approach. We believe the justice system can provide the services the Micmac want.

We can comment to a limited extent on some of the recommendations but we are constrained by three factors:

1. Our mandate is the structure of the court system as it exists.

2. The Marshall Commission studied the issue of Native justice and commented on it only last year. We do not have the facts or expertise available to that Commission to deal with Native justice matters.

3. We were not addressed by any of the other Micmac organizations.

12.2.2 Courts on Reserves

Grand Captain Denny's first recommendation is that there be sittings of the Provincial Court and Family Court at the Eskasoni Reserve and the Indian Brook Reserve (Shubenacadie).

In general we do not feel that a court must sit in a particular community to be the court for that community but the cultural gulf that apparently exists between Native communities and the mainstream of society justifies an exception. Comments in recent literature, the press and to the Marshall Commission reveal a strong Native sense of alienation from what they refer to as "settler institutions", including the justice system. Many Natives feel that the Canadian legal system is a foreign one.

It is the Task Force's hope that, if the justice system can adapt to meet their legitimate demands, the Native communities will conclude that they do not need a separate justice system. A useful first step would be sittings of courts on reserves.

We agree with Grand Captain Denny that it will be easier to familiarize the personnel of courts regularly visiting the reserves with Micmac culture and practices than all personnel in the justice system.

It should be noted that it is the sense of isolation, not the geographic isolation that this proposal addresses. For example, there is a large and up to date court facility in Shubenacadie, only a few miles from the Indian Brook Reserve. But, while parts of Colchester, Hants and Halifax Counties may feel a sense of proprietorship over the facility, if the Grand Captain is correct, the residents of Indian Brook do not.

It is essential that the courts be invited onto the Reserves by the communities themselves. Presumably this invitation would be extended by the band council. The sense of alienation will hardly be relieved if a court presence is imposed. We note, for example, that the Family Court has offered to sit at Indian Brook and, when judicial personnel can be arranged, at Eskasoni. This offer has not been taken up. There may be good reasons for this reluctance, we do not know, but it is worth noting if we are not to fall into the paternalistic ways that have failed in the past.

Recommendation 37

Upon request by the Band Council at Indian Brook Reserve or Eskasoni Reserve, the Provincial Court and the Family Court should hold regular sittings in those communities.

12.2.3 Jurisdiction

The Grand Captain wants these courts to have full jurisdiction over treaty and aboriginal rights, and family law. The Provincial Court has jurisdiction over penal provisions of provincial statutes, including hunting and fishing laws. These are the chief source of case law regarding aboriginal treaty rights. It is not constitutionally possible to confer jurisdiction with respect to all aboriginal and treaty matters on a provincially appointed judge. The Family Court has jurisdiction over custody and child welfare cases but not, as we have said elsewhere, divorce. The establishment of a Family Division of the Supreme Court will centralize this jurisdiction but may complicate sitting on reserves.

We believe that the Provincial Court and the Family Court substantially have the jurisdiction Grand Captain Denny seeks.

12.2.4 Native Court Worker Training

We note that the Royal Commission on the Donald Marshall Jr. Prosecution recommended establishment of a native court worker program.[101] We are not able to comment on the need for, or effectiveness of, a court worker program.

We can say that there is a need for "cultural bridging" and that the court worker program is an effort at cultural bridging. The court worker becomes the medium that explains the justice system to the Native accused and the culture of the Native accused to the justice system. But, if courts and justice personnel sit regularly on the reserves, a cultural bridge should develop without a court worker as an intermediary. Ideally, this is what will happen. Whether this will turn out to be the case we cannot say. If it does, there will be no need for court workers.

12.2.5 Sensitization

Mr. Henderson told us: "It's not the race or the culture (of the judges and lawyers), it's the content of the consciousness and the legal training that's going to solve all of our problems." Since the release of the Marshall Report in January, 1990, some progress has been made in this regard. There are efforts underway to sensitize judges, crown attorneys and the private bar to Micmac concerns and culture. The most ambitious is a five-day program on Micmac culture and customs the R.C.M.P. has established.

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[101] *Recommendation 24.*

It is worthwhile explaining the justice system to Native community leaders too. The Public Legal Education Society of Nova Scotia recently published *Mi'kmaq and the Law*, a survey of Canadian laws affecting native people directly and indirectly. This is a good effort, but education should not be limited to books, seminars and training. Communication is the best sensitization. There should be regular meetings between Native communities and regional crown attorneys, the local bar and judges - not to discuss individual cases, but the legal process generally, and Native concerns with it.

12.2.6 Community Justice

The Grand Captain also wants native communities involved in the determination of prosecutorial priorities. We have learned that some native communities in other provinces have community justice committees comprised of representatives of the community, the police, band council, school, health and social workers. These committees advise the court on sentencing and develop and implement mediation, diversion and sentencing options. It seems to the Task Force that such committees could provide a sense of proprietorship in the legal system that is lacking at this time. It could also be an effective mediator between the justice system and the community.

We note that the Marshall Commission recommended the establishment of a native justice committee and that the government of Nova Scotia accepted this recommendation.[102] However, we regret to note as well, that no progress appears to have been made in this regard. This may be because early efforts to implement the Marshall recommendations regarding the Micmac have concentrated on the Tripartite Forum. Once again, it is difficult for us to reach any conclusion, but the Tripartite Forum does not seem to be a condition precedent to the establishment of community justice committees.

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[102] *Recommendation 29.*

Recommendation 38

Native justice committees should be established to consult with crown attorneys and advise judges on sentencing and to facilitate, in conjunction with the Solicitor General's Department, alternative penalty and fine options programs in their community.

13. SMALL CLAIMS COURT

13.1 Introduction

The Small Claims Court was established as a court of record of junior jurisdiction in Nova Scotia by the *Small Claims Court Act*[103] in 1980. There are 20 such courts in Nova Scotia. This court provides an inexpensive and informal forum where citizens can present their legal problems in person without incurring the procedural and financial difficulties of the higher courts. The fee for filing a claim is now $30.00. Each party may employ a lawyer to represent his or her interests, but this is not required. Costs of the proceedings may be awarded to a successful claimant, but costs do not include legal fees.

Since its inception, the philosophy of the Small Claims Court has been to assist the claimants and respondents in conducting their own law suits. The staff of the Small Claims Court guide claimants and defendants through the process but do not provide legal advice on their claims. The Department of the Attorney General has produced a brochure to help explain the purpose and process of the Small Claims Court. A more extensive booklet, produced by the Public Legal Education Society of Nova Scotia, is available for a modest price. These booklets are generally found in the various court offices where small claims may be initiated.

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[103] *R.S.N.S. 1989, Chapter 430.*

The present Nova Scotia Small Claims Court is a "stand alone" court. It has some administrative attachment to the County Court in that orders of the Adjudicators who hear and decide cases in the Small Claims Court are made orders of the County Court for purposes of executions.

13.2 Organization

13.2.1 Jurisdiction

In 1986 the civil jurisdiction of the Small Claims Court was increased to $3,000.00 and the jurisdiction of the Supreme Court was restricted to claims over $3,000.00.[104] However, there is concurrent jurisdiction with the County Court for claims under $3,000.00 and theoretically with the Halifax City Court which has jurisdiction in civil matters up to $500.00. As a practical matter, however, the Halifax City Court does not hear any small civil claims.

The jurisdiction of the Small Claims Court does not include matters dealing with (a) the ownership of land; (b) wills; (c) landlord and tenant disputes; (d) malicious prosecution; (e) false imprisonment; or (f) defamation (libel and slander). These matters must be dealt with by the County Court or the Supreme Court.

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[104] *S.N.S., 1986, c. 64.*

13.2.2 Adjudicators

The Small Claims Court is presided over by 20 adjudicators, all of whom are members of the Nova Scotia Bar. Hearings are conducted at night for the convenience of the participants and adjudicators are paid $150.00 for each three-hour evening session plus expenses. Clerks of the County Court and other staff of the Attorney General's Department act as Clerks of the Small Claims Court and the Sheriff's Division of the Department provides security, if required.

13.2.3 Caseload

Since the court was instituted in January of 1981, it has processed in excess of 55,000 claims province-wide.[105] During the 1988/89 fiscal year, 9,656 cases were commenced and 5,062 actually heard.[106] The cases involve contract and tort issues and are for items borrowed and not returned, bills unpaid, fenders crumpled and services improperly performed; in short, all the petty trespasses and irritations of life in a complex commercial society. Indications are that the court is being used more and more by litigants in spite of the fact that its existence is still not universally known.

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[105] *Departmental Report to the Attorney General, January, 1989.*

[106] *See Appendix 8.*

13.2.4 Objectives

Recognition of the need for a court to deal with civil matters where the amount of money involved is relatively small is not new. We can see early recognition of the need in Nova Scotia as far back as 1817 with the creation of the Recorders Court. The objective was and is to create a court that would satisfy the following criteria: (1) accessibility; (2) low costs; (3) informality; (4) simplicity; (5) quick and efficient disposal of cases; and (6) fairness. All of these criteria are to be met at the same time, and any perception of second class justice is to be avoided. How is this to be accomplished? Can it be accomplished?

13.3 Options for Change

13.3.1 Other Provinces

In Nova Scotia we have opted for legally trained adjudicators rather than lay persons or real judges. Other jurisdictions have chosen different models.

Manitoba, New Brunswick and Prince Edward Island all have small claims matters dealt with by their superior courts using a more simplified litigation procedure. In Manitoba, although the Provincial Law Reform Commission had recommended that small claims be handled by Provincial Court judges and that a civil division of the Provincial Court be established, the government chose to have small claims handled by the Superior Court of Queens Bench. In fact, officials called "officers" who are not legally trained and function much like County Court clerks are allowed to hear contested matters under $1,000.00. Their subject matter jurisdiction is not limited as it is in Nova Scotia and this has apparently caused some problems. Manitoba is currently considering having all claims handled either by legally trained persons or by judges. In New Brunswick, small claims are heard by Queens Bench judges, also using a simplified trial procedure. Initially in New Brunswick, the Superior Court judges delegated small claims to their Court clerks, as the legislation permitted them to do, but this has recently been stopped.[107]

In the Provinces of Newfoundland, Alberta, British Columbia and Saskatchewan, small claims are heard by Provincial Court judges. The rationale for having small claims heard by Provincial Court judges is based upon the following considerations:

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[107] *Information concerning the situation in Manitoba and New Brunswick was obtained in discussions with officials of the Attorney General's Department in each province and Chief Justice Stratton of New Brunswick.*

1. These cases should be heard by real judges because the issues are important to the parties concerned and they can involve legal questions that should be dealt with by a real judge.

2. The courts are accessible because they are spread around the province in less populated areas.

3. Judges of the Provincial Court are used to dealing with a high volume, more routine type of case.

4. Judges of the Provincial Court more readily adapt to the more informal procedures required by a small claims process where the litigants are often not represented by counsel.

The new Ontario court restructuring legislation establishes the Small Claims Court as a branch of the General Division of the Ontario Court of Justice. Prior to this, small claims had been handled by the Civil Division of the Provincial Court. Jurisdiction has increased to $5,000.00. Claims up to $3,000.00 will be heard by part-time deputy judges while claims between $3,000.00 and $5,000.00 will be heard by superior court judges of the General Division. They also anticipate that Provincial Court judges (prior to merger stage 2) will continue to be available to hear cases up to $5,000.00.

In the Provinces of British Columbia and Ontario, concerns have been expressed that the cost of litigation in the superior courts for cases involving monetary amounts between $3,000.00 and $15,000.00 or $20,000.00 is prohibitive. The Zuber Report, for example, notes that bills of costs in the District (County) Court in Ontario result in a winning party retaining only 20 to 30% of the judgment amount award. The result, it is alleged, is that claims for modest amounts are not being pressed.

In response to these concerns, court reform committees in Ontario and British Columbia have recommended the development of economical litigation programs which institute simplified, low cost procedures for civil claims between $3,000.00 and $15,000.00 (Ontario) or $20,000.00 (British Columbia).

13.3.2 Advice Received

1. The Association of Provincial Court Judges does not favour the existing adjudicator system because:

    (a) litigants should have real judges even though amounts are small;

(b) part-time, anonymous adjudicators have little opportunity to develop a body of precedent.[108]

2. The Senior Solicitor in the Department of the Attorney General responsible for advising adjudicators, Mr. Jonathan Davies, recommends retention of the existing system because "the Small Claims Court is a success story. It is doing a good job quickly and without drawing attention to itself."[109]

3. Clerks of the Small Claims Court all see the existing system as working well both from their own perspective and, as far as they can tell, from that of the litigants.

4. The majority of adjudicators responding favoured maintaining the court as a separate court with adjudicators as is at present. They were divided on the issue of increased monetary jurisdiction.

5. An attempt was made to survey previous litigants to see what was their assessment of the Small Claims Court experience. Although the number of litigants responding was small (only six), they were unanimous in their view that the system worked well and declared that they would use it again. At least one of those responding was a person who lost his case.

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[108] *Brief submitted by the Association of Provincial Court Judges, August, 1990, p. 8.*

[109] *Submission to the Task Force by Mr. J. Davies, June 25, 1990.*

13.4 Analysis

The main reason for making the Small Claims Court part of the superior court, either as a branch of it or as a division, seems to be the desire to show the public that small claims are taken seriously by the legal system and are not treated as second class or inferior claims. Whether the litigants actually see things this way has never been clearly established.

One difficulty with small claims being dealt with by superior court judges is access for rural litigants. Merger and the creation of resident Supreme Court judges would relieve this problem to a degree (night sittings might still be a problem). However, another obstacle, and one we believe is a significant one, is the need to have superior court judges adopt (and adapt to) a very special kind of informal, inquisitorial approach to the litigation of small claims. Even if special procedures were developed, we find it difficult to believe that Supreme Court judges can make the necessary shift in approach so as to provide the air of informality and involvement that is required in a situation where one or both parties are without legal representation. It will be interesting to see the results in New Brunswick.

We have tried to generate some limited statistical data regarding the filing of modest monetary claims in both the County Court for District #1

(Halifax County) and the Supreme Court of Nova Scotia.[110] This data, limited as it is, suggests that, proportionately, many modest claims are being pressed in both courts at present. It is possible, of course, with less costly procedures, that even more cases would be pursued, but the personal experience of several Task Force members reinforces the evidence provided by our statistical data that in Nova Scotia it is still financially feasible for a plaintiff to press a claim for a modest amount of money in the Supreme and County Courts.

However, the $3,000.00 limit has existed since 1986 and been eroded by inflation. It may no longer be an appropriate limit. Rather than create a separate procedure in the Supreme Court to process modest monetary claims, it seems preferable to increase the jurisdiction of the Small Claims Court to $5,000.00.

13.5 Conclusions

13.5.1 Structural

1. The existing system, while it can be improved, seems to be working well. The users are satisfied with it as are the personnel who are running it. It is cost effective and accessible. The lawyers who serve

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[110] *See Appendix 3.*

as adjudicators seem for the most part to have adapted well to the special semi-inquisitorial approach required. They are dedicated people who appear to be doing a difficult job very competently. The low rate of appeal of 2% suggests that there are not a great number of dissatisfied litigants although how many are discouraged from appealing because of the cost of doing so is unknown.[111]

2. In light of the New Brunswick and Manitoba experience with lay persons serving as adjudicators, it seems preferable to retain legally trained persons in this capacity. As the Manitoba Law Reform Commission argued:

> *"Legally trained Adjudicators would be better able to assist self-represented litigants during the course of a hearing in that the contentious issues could be more clearly defined and the manner of introducing oral evidence be subject to greater supervision or control. Experience elsewhere would suggest that claims can be handled more expeditiously when Adjudicators are legally trained. Legal training also encourages decisions to be governed by principles of law between judgments. Primarily, however, legal training is essential because of the importance of the concept of equality before the law and the fact that the court system must not be seen to be administering a different*

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[111] *See Appendix 8.*

form of justice for claims of lower sums."[112]

3. Although we are committed to trying to simplify the court structure and although it would be neater to incorporate small claims matters and the court within either the Supreme Court or the Provincial Court, such an inclination should be resisted for several reasons:

   (1) Because most litigants are unrepresented, the process has to be quite informal with the adjudicator assuming an interventionist stance. Even with special procedures it is difficult to see Provincial Court or Supreme Court judges adapting as well as our adjudicators have to the more inquisitorial approach.

   (2) Placing small claims disputes within either the Supreme or the Provincial Court will encourage the use of lawyers by litigants. Use of lawyers will foster a more technical approach.

   (3) The present system is cost effective. Only if the present Supreme Court or Provincial Court judges were to take on the additional 5,000 cases (and growing) involving small claims would the cost be kept to a minimum.

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[112] *Report on the Structure of the Courts; Part Two: The Adjudication of Smaller Claims (1983), p. 17.*

(4) The present system is working well. It is convenient to litigants because the adjudicators sit at night to hear cases. We seriously doubt that Supreme Court or Provincial Court judges would be prepared to do the same.

(5) It is questionable whether litigants consider themselves to be receiving second class justice from a second class court because their cases are heard by legally trained personnel rather than real judges. The characteristics that are seen as second class by lawyers and judges contribute to the informal, friendly atmosphere appreciated by unrepresented litigants.

4. At present the Small Claims Court has concurrent jurisdiction with the County Court in relation to claims up to $3,000.00. If the Supreme and County Courts are merged, the Small Claims Court should have exclusive jurisdiction. Otherwise a corporate plaintiff or a collection agency might commence the case in the higher court, with its higher cost and perceived need for legal representation, in order to discourage the defendant or to get a default judgment. Even permitting the defendant to elect down to the Small Claims Court would involve a delay.

5. Although there is some concern that raising the monetary limit to $5,000.00 will encourage more lawyers to become involved in the Small Claims process, thus formalizing it, our view is that this will

have a minor impact on the overall operation. The benefits to be achieved by a higher maximum monetary jurisdiction will offset any negative consequences.

Recommendation 39

The Small Claims Court should be maintained as is, a separate court with hearings conducted by legally trained adjudicators.

Recommendation 40

The Small Claims Court should have exclusive civil jurisdiction up to $5,000.00. This limit should be reviewed periodically.

13.5.2 Procedural Suggestions

Although the existing system seems to be working remarkably well, there are areas where improvements could be made. Our discussion with Clerks and the responses from adjudicators and litigants reveal several problem areas where changes for the better might be made.

Mandatory Filing of a Defence

Under existing provisions the defendant need not file a defence or indicate an intention to do so. This makes it difficult for the Court Clerk and the adjudicator to determine how long the case will take because they don't know whether it will be contested or not. This, of course, means that the scheduling of cases is much more uncertain than it needs to be. In addition, the plaintiff does not know, at least formally, what defence will be raised and is unable to prepare to meet that defence. We were told by some clerks that in smaller communities, the plaintiff has a pretty good idea what the defence will be without a formal defence being filed.

The "no show" percentage provincially is 13% and in Halifax 16%, so that it is not an insignificant figure.[113] A majority of adjudicators (4 out of 6) were in favour of a mandatory filing of defence. Failure to file a defence would carry no sanction except a warning that, in the absence of a defence, judgment might be entered against the defendant. Filing a defence by merely indicating that the claim would be contested, while not much value to the claimant, would not impose much of a burden on the defendant and could help to schedule the time of the court more effectively.

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[113] *See Appendix 8.*

Recommendation 41

Small Claims defendants should be required to file a simple defence indicating at least that the claim will be contested.

Default Judgment

The present legislative provisions do not provide for default judgments. If the defendant fails to appear and defend, the court cannot automatically allow the claim. Section 23 of the *Small Claims Court Act* stipulates that, even though the defendant does not appear, the claimant must satisfy the adjudicator not only that service has been made either by personal service or certified mail, but also that the claimant has an established claim.

The adjudicators were evenly split on the question whether this procedure should be changed to allow for a normal default judgment. It was pointed out to us by a lawyer that the absence of the normal default judgment prompts claimants to bring cases in County Court, where default judgment can be obtained quickly. Available statistics confirm that this is happening.

If merger takes place, there will be no court to which a claimant might go in order to get a default judgment unless the jurisdiction of the Supreme Court for civil actions under $3,000.00 is restored, a change we do not recommend.

In order to partially relieve this situation, we propose that the following procedure be instituted:

> *The claim form served on the defendant should contain (a) notice of the requirement to file a simple defence; and (b) a form for filing a simple defence, if the defendant intends to defend the claim.*
>
> *If the defendant files such a notice but does not show up for the hearing, the plaintiff proceeds, as now, to lay a basis for the claim before the adjudicator and, if successful, obtains judgment.*
>
> *If the defendant does not file a defence within a fixed time, the plaintiff can obtain default judgment without a hearing by (a) proving service of the claim; and (b) submitting a synopsis of the claim. If the Adjudicator is satisfied there is some basis for the claim, judgment can be awarded to the plaintiff.*

Recommendation 42

The *Small Claims Court Act* and forms should be amended to allow defendants to file a simple form of defence if they intend to defend the claim.

Recommendation 43

The *Small Claims Court Act* should be amended to allow the adjudicator to order default judgment without a hearing when

(a) the defendant files a defence but does not appear at the time scheduled for the hearing of the matter; or

(b) the defendant does not file a defence within a reasonable time specified in the Act and the plaintiff furnishes written proof of service and the basis of the claim.

Execution Procedure

Existing legislative provisions require the adjudicator's Order to be verified by the County Court for purposes of execution. Currently, the Clerk of the Small Claims Court stamps the order of the court with a notation that more or less reads, "The within is made an Order of the County Court" and the adjudicator signs it. The County Court judge never sees the notation but it is treated as an order of that court.

This added purely administrative step seems unnecessary. There does not seem to be any reason why an order of the Small Claims Court cannot be executed by the Sheriff.

Recommendation 44

The practice of having the order of the Small Claims adjudicator confirmed by a County Court judge should be abolished and the *Small Claims Court Act* be amended to provide the Small Claims Court with its own execution process.

Appeals

Jonathan Davies, the lawyer in the Attorney General's Department responsible for the Small Claims Court, outlined the difficulties with the present appeal provisions:

> *"An appeal from an Adjudicator's decision is limited to grounds of breach of natural justice, error of law or jurisdiction. The appeal to the County Court is by stated case and is final except for review by certiorari on similar grounds from the Supreme Court (Section 32). The stated case requirement is anachronistic. The County Court has interpreted it as limiting the review to the submitted stated case. In cases where there are allegations that an Adjudicator has breached the rules of natural justice or is biased, there is no opportunity to bring new evidence before the Appeal Court. These provisions need*

> *review. Making the Small Claims Court subject to a standardized review procedure along with other tribunals should be considered."*

Mr. Davies suggests amendments which would remove the reference to an appeal by way of a "stated case" and broaden the record that can be reviewed by the higher court. The intention is not to expand the grounds upon which the court may review the decision, but only to provide the court with an adequate record upon which to base its decision. The proposal is to have the adjudicator, where he has not given a written decision in the matter under appeal, provide a summary report of the findings of law and fact made in the case, including the basis of any findings raised in the Notice of Appeal and any interpretation of documents made by the adjudicator. In all other respects, the appeal should proceed as provided in the provisions of the *Small Claims Court Act*.

Recommendation 45

The *Small Claims Court Act* should be amended to require either the written decision, if there is one, or a summary of findings of fact and law if there isn't, to be filed with the court hearing the case on appeal.

Small Claims and Alternate Dispute Resolution

Because most litigants are unrepresented there are no agents (lawyers usually) to explore the possibility of settlement between the litigants. The litigants themselves may discuss settlement but there are no third party facilitators. One commentator has suggested that this is an area where a court directed mediation program is needed.

In Ontario, mediation of small claims disputes by court appointed referees has been used since 1978 in the County of Middlesex.[114] Referees perform a similar service in the Windsor Essex Mediation Centre, established by the Canadian Bar Association. In Toronto the Provincial Court (Civil Division) sends most small claims cases under $1,000.00 and some cases involving larger amounts to referees who conduct pre-trial conferences in an effort to settle matters in dispute between the parties. Experimental mediation programs for small claims have also been established in British Columbia and Quebec.

Ontario's Director of Small Claims Court estimates that the referee system has saved the Province one and one-half judge years. In the Windsor Essex Mediation Centre, 36% of the cases heard by the referees result in settlements. One analysis and evaluation of small claims mediation suggests that mediation is more likely to be successful in cases where the defence admits partial liability.[115] Where this is not the case, court ordered mediation simply imposes another procedural step or stage on the way to litigation and it is always possible that court coerced mediation will lead to coercive mediation. Compromise settlements are not always fair settlements.

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[114] *See Russell, P. H., The Judiciary in Canada: The Third Branch of Government (1987), c. 10 at pp. 245-6.*

We should remember that 90 to 95% of the cases in our regular courts settle before the adjudication stage is reached. The litigation process forces the parties to consider settlement. But over 50% of the small claims cases are actually heard. To this extent, small claims cases are different than other cases where clients are legally represented and the settlement process is at work. This might seem to be a good reason for injecting compulsory mediation into the small claims case. However, it could be argued that, given the often unequal bargaining power of the parties and lack of counsel, a trial before an adjudicator (who has a special responsibility to protect unrepresented or disadvantaged parties) is better than out of court settlement.

Our discussions with court clerks and adjudicators indicate attempts are made by officials to have the parties talk things over before the case is heard. One adjudicator hears all uncontested matters first and, while hearing those cases, asks the contesting parties to "step outside and chat". This, apparently, has worked on many occasions. Others have pointed out to us that in most cases the parties know each other and usually there has been some attempt to work things out before the parties end up in Small Claims Court.

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[115] *Vidnor, "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation", Law Society Review (1984), at p. 545. Referred to by Russell at 246.*

Given the fact that our system seems to be working well with legally trained adjudicators rather than regular judges, the insertion of mediation as a required step in the process would be adding an additional expense and delay in return for marginal benefits.

Recommendation 46

We do not recommend the inclusion of mediation as a required step in the Small Claims procedure at this time.

Greater public awareness of the existence of this court will increase its use. There is a need to provide litigants with efficient and effective advice about small claims procedures when litigation is considered and commenced. Court clerks help as much as they can, but in the busier centres this may not be enough. Here again there is need for better training if we are to continue to use existing court personnel in a helping role. Employment of graduates of community college legal skills programs as small claims support staff is also an attractive option. At some time in the future, technology could provide a video and computer assisted instructional program for use by clients.

Recommendation 47

Greater use of the Small Claims Court may necessitate additional personnel to assist litigants with information on forms and procedures. The Department of Attorney General should formally recognize the consumer service aspect of the duties of the court's support staff. A major element of this should include training in interpersonal skills and the legal system in general. Employment of graduates of community college law programs as court staff would facilitate the flow of information.

14. VICTIMS AND WITNESSES

14.1 Introduction

14.1.1 Public Hearings

By far the greatest number of presentations at our public meetings were by people concerned with victims and particularly the treatment of abused women and children. Their suggestions and complaints about the justice system were many and varied. Some seemed to suggest that the presumption of innocence and the right of cross examination in criminal trials should be curtailed while others simply asked for minimum guarantees of dignity and courtesy.

It is fair to say that each of the presentations made a profound impression on the Task Force. Their specific complaints often differed and sometimes contradicted each other but they all made a central point: ordinary, law abiding citizens feel that the criminal justice system is ignoring them. They feel that it offers them little protection when they need it and, when it needs them (to testify, for example) it treats them callously and lays them open to abuse.

14.1.2 Our Mandate

We are concerned with the structure and efficiency of the courts, including access, delay reduction and simplification. Improvements in matters such as these will help victims but we don't feel we can stop there. If the system is truly indifferent to victims and witnesses and the other ordinary citizens it is intended to serve, then structural changes will make it better at what it does but won't affect what it doesn't do. Even if it is not indifferent, if it is perceived to be indifferent to public needs, the public will consider it irrelevant and burdensome. This is more insidious than scandal because, if the system is otherwise working satisfactorily, scandals are eventually recognized as isolated incidents.

14.2 The Justice System and Victims

14.2.1 Is the System Indifferent?

The people who addressed us were divided into two camps:

(1) those who believe that victims' needs haven't been recognized by the system;

(2) those who believe that victims' needs have been recognized but are only beginning to be addressed.

There's evidence to support both views but we believe that on balance the problems have been recognized and that the obstacles to progress in this area are the result of a lack of (1) clarity about solutions, (2) resources, and (3) a clear signal that the solution to these problems is of the highest priority.

So, for example, the Nova Scotia Department of Solicitor General has established, with the assistance of the Federal Government, a Family Violence Tracking Project which will monitor cases of family violence as they move through the justice system over the next three years. This is intended to provide the hard data required for long term improvement of service to victims of domestic violence.

The Department of Attorney General established a Victims' Services Division in April of 1989 and, during the 1989 session, the Legislature passed the Victims Rights and Services Act (in force January 1, 1990).[116]

The Attorney General and Solicitor General have issued directives to Crown Attorneys and police regarding the handling of spousal assault cases and we were told at our public meetings, these directives have improved things to a degree. Several interdisciplinary committees are at work developing protocols and strategies that will enable the justice system to better respond to domestic violence, sexual assault and child abuse cases.

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[116] *S.N.S., 1989, c. 14.*

14.2.2 Is The System Any Different?

These are signs that the agencies of government responsible for the justice system have recognized the problem, but the changes are still embryonic. In fairness to the departments involved, it appears that they are laying the ground work needed for fundamental long term change. However, most of the victims' groups who spoke to the Task Force know little about this. Those who were knowledgable were also skeptical. Some noted that the Victim Services Branch has not been fully funded and has for this reason been slow to get started.

It is interesting that much has changed in the justice system without government leadership. The victims' groups who spoke to us reported that there is a greater awareness today of the rights and feelings of victims than only a few years ago. Progress has come in unexpected forms too; community service orders and other alternative penalties frequently help reconcile the victim of a minor crime with the perpetrator though that was probably not their first goal.

Another positive sign is the recent announcement that the Victims' Assistance Fund established under the Victims Rights and Services Act is now available for project funding to assist victims of crime. The funding priorities for the program for 1990 to 1995 are child abuse, sexual assault, and family violence. We were told by the co-ordinator of Victim Services that these priorities were identified in a province-wide survey of community and criminal justice participants conducted for the Victims Services Division.

14.3 Victims' Needs

14.3.1 Understanding

The first thing the victims' groups told us is that the system must show greater sensitivity to the special position of victims. For example, representatives of transition houses for battered women and children told us that many justice workers failed to appreciate that domestic violence is an unique form of crime. They say justice workers are not aware of the long term nature of family violence and the power structure in abusive families and that they equate a family assault with similar assaults between persons who are not in an intimate relationship. That is, they see a violent domestic incident as an isolated event, the same as a shoving match in a bar, when it is more likely one manifestation of a climate of fear and violence.

Is this correct? Are most justice workers so callous? We cannot be sure. We have no first hand experience. We know only what we were told and we were told conflicting things at times. Yet we are convinced the justice system must do more to understand the people on whom it depends and who depend most heavily on it.

14.3.2 Conflicting Values

We recognize that there will often be a conflict between the victim, who wants the wrongdoer punished, and the justice system. The justice system believes it is better to let ten guilty people go free than to convict an innocent one. The justice system demands that the prosecutor be a detached, objective seeker after justice, not the victim's lawyer.

We understand the difficulties victims and witnesses face in court but we do not suggest that the testimony of every person claiming to be a victim should be accepted uncritically. We recognize that a victim will often be dissatisfied by the acquittal of his or her tormenter but, with the lessons of the Donald Marshall Jr. prosecution so recently brought to our attention, it is not necessary to demonstrate the value of an independent prosecutor and the presumption of innocence.

The victim frequently interprets an acquittal as a failure of the justice system. It usually isn't, but if evidence could have been found or presented with due diligence on the part of the police or prosecutor or, if it was, and the judge or jury were unable to appreciate the situation described by the evidence, then it is a failure of the justice system.

Put another way, if an acquittal results because the police or prosecution were unable to successfully elicit information and testimony from a victim because of their failure to understand the difficulties the victim faces or because a judge applies standard measures of creditability that are appropriate to a bar room brawl but are misleading in domestic matters, there is reason for dissatisfaction.

14.3.3 Conclusions

It is in the treatment and understanding of victims by justice personnel, that the greatest strides can be made without any relaxation of the burden on the prosecution. We do not believe it is necessary to dismember a major part of criminal law in order to improve the lot of victims and their witnesses. Even within the strict and clinical confines of a criminal case there is room for a better understanding of the victim. The needs assessment prepared for the Victims' Services Division of the Attorney

General's Department identified three fundamental victims needs. They are, in our view, consistent with the concerns expressed by the people who addressed us and they are not inconsistent with the rights of accused persons to a fair trial. They are as follows:

1. **Safety:** that is, protection from intimation, confrontation and security risks while in court. This requires: (a) separate waiting areas where victims can seek support services and be away from the accused; (b) an alternate entrance and exit from the court house, where necessary, so that victims not be confronted by the accused; (c) privacy from the press and public; (d) separate waiting areas for child witnesses so that they may be relaxed and as well prepared for their testimony as is possible; and (e) that children's waiting areas should be designed in a "child-centred" manner complete with children's furniture, toys and bathroom.

2. **Respectful treatment:** victims need to see and hear that they are respected and that the offence alleged is regarded as serious. They must see this in the actions and behaviour of prosecutors, defence lawyers, judges and court staff. This includes giving them an opportunity to express their views and to have them considered.

3. **Information:** much of the dissatisfaction with the justice system stems from a lack of information about the process and the roles of the various parties in the process. This was a recurring theme in the study of

community concerns undertaken by the Public Legal Education Society of Nova Scotia for the Court Structure Task Force. That study specifically identified the need for information on legal procedures in plain language.

Recommendation 48

We believe that the government must move quickly to fully implement the Victims' Services Program in the Department of Attorney General including both the community based, non-profit helping agencies and the staff services programs in order to provide:

(a) general information about the criminal justice system;

(b) information about the specific case in which the victim is involved;

(c) liaison with prosecutors, police and other professionals;

(d) general assistance in the completion of forms such as victim impact statements and compensation claims;

(e) assistance in preparation of victims and family members for court including accompaniment to court hearings; and

(f) generally emotional support to all victims, members of their families and other associated persons to guide them through the legal process.

Recommendation 49

Crown attorneys, and court staff, particularly officers such clerks and court security, should receive specific training in victims concerns and the effects of violence on individuals and their ability to give evidence.

Recommendation 50

Crown attorneys should be given enough time to enable them to address victim and witness concerns in sensitive cases such as sexual assault, domestic violence, robbery with violence and, generally, cases involving children.

Recommendation 51

Sensitivity on victims' issues should be included as an element of the selection process for judges and court personnel.

Recommendation 52

The Director of Public Prosecutions should establish a program that will allow Crown attorneys to develop the techniques and familiarity required to deal with cases of domestic violence, sexual assault and child abuse. This may take the form of a permanent special unit or a program through which many or all Crown attorneys circulate. The choices are an operational matter.

15. PLAIN LANGUAGE

15.1.1 Plain Language Movement

The Plain Language Movement has been in existence for twenty years and has roots in England, the U.S.A. and Australia. In Canada the Canadian Law Information Council's Plain Language Centre has been the focus of plain language activities. Of the provinces, British Columbia is apparently the most advanced province in terms of the production of public legal education materials while the Yukon Territory has made plain language a priority in its legislation for over three years.

15.1.2 Demand for Plain Language

Responses received from community agencies and documented in our Public Legal Education Report, as well as submissions made to the Task Force at public hearings by groups and individuals, indicate a clear need for more information about the legal system and its processes, as well as the rights and duties that citizens have. Such information should be conveyed clearly and simply to those affected. This means that substantive laws themselves should be written as plainly as possible so that they can be understood by the average citizen, documents people sign should be drafted in such a way that they can be easily comprehended and rules of procedure made intelligible. In short, we heard that there is a need for the use of plain language throughout the legal system which is related to better training and instruction of clerks, intake workers and other officials in the legal system about the workings of the system and the need for them to take time to convey their knowledge to those citizens using the system.

15.1.3 Complaints

Common complaints about legalese are: sentences that are too long, repetition of synonyms, use of archaic words and the use of foreign phrases, either old English, French or Latin, that mean very little to the lay person.

Repetitive synonyms can be explained on the basis of the over cautious lawyer, afraid that one word might not cover all eventualities. In many cases, however, multiple synonyms do not provide a broader meaning than one well chosen word. It is true that some archaic words have technical meanings understandable by lawyers and courts. But can the same legal effect be obtained by using plain language? Some lawyers argue that a small tome would be required in order to express the same technical concept in plain language. However, work by legal linguists suggests that most of the words we use are not nearly as precise as they appear to be, including technical words, and that courts, when required to give meaning to these words, will be inclined to place emphasis upon the intention of the parties in relation to the issues being dealt with rather than the technical meaning of the words themselves.

Given present concerns over professional liability by the legal profession, it would seem that any movement towards greater use of plain language by lawyers will be a cautious one. If any initiative is to be taken in this area, it will have to come from governments.

15.2 Purpose of Plain Language

The purpose of plain language use is to enable members of the public to understand their rights and duties. Essentially this requires better communication in the form of a statute, rule of procedure or oral explanation. Use of language that the citizen can understand will help to build positive links between the justice system and public. It will save money and time, and the justice system will be more relevant, efficient, accessible and less costly by the use of plain language.

15.3 Plain Meaning by Design

Readability is not always the same as substantive clarity. Simplicity of language should not adversely affect the substantive principles inherent in any subject matter. Sometimes difficult language is unavoidable but, even then, it can be aided by good document design with effective use of headings, type face, layout and graphics.

15.4 Conclusions

Greater use of plain language is needed in our legal system if it is to be comprehensible to the public. This means that the substantive law, legal documents, explanations and legal procedures all have to be expressed in language that the citizen can understand. Court officials, judges and lawyers must recognize the benefits of plain language and the worth of the extra effort it entails. The Task Force was very impressed with the report of the Justice Reform Committee of British Columbia and their recommendations in relation to the use of plain language.[117] We think their approach is the right one and should be followed in Nova Scotia.

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[117] *See p. 6 of their report.*

Recommendation 53

The Attorney General should establish a plain language committee to develop a strategy for implementation of plain language in the justice system in Nova Scotia.

This should be a senior level, policy making body that could provide leadership to the bar, the Judiciary and to the government at large. It should be assisted by a working committee and the working committee should have authority to: establish plain language guidelines for documents; review selected documents which affect the wide segment of the public for conformity with the guidelines; monitor the progress of plain language implementation in the courts, government and the private sector; provide training to staff who are responsible for document design and development.

16. ADMINISTRATIVE TRIBUNALS

16.1 Introduction

There are, in Nova Scotia, several hundred administrative bodies performing a variety of functions including adjudication, administration, and regulation. Although in one sense these tribunals can be considered extensions of the executive branch of government, many of them are also recognized as having the basic characteristics of courts. As one English government report stated:

> *"We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration."*[118]

Many of these tribunals exercise functions that were formerly exercised by the ordinary courts, such as the Workers' Compensation Board and the Workers' Compensation Appeal Board, and their decisions clearly affect the rights of citizens.

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[118] *"Frank Report, Administrative Tribunals & Enquiries", Cmnd. 218, 1957, (para. 406).*

16.2 Current Situation

16.2.1 Nova Scotia

Little is written about Nova Scotia's administrative tribunals. We were unable to find anyone who knows exactly how many there are. The cursory review that we undertook found more than 300 in Nova Scotia, of which approximately 130 might hold hearings at least occasionally. They range from the Fences Arbitration Committee for the District of Claire through the regional Residential Tenancies Boards to the Public Utilities Board.

We know quite a bit about one or two of the major tribunals but not much about the mass of them. We assume, however, that the situation in Ontario is no worse than in Nova Scotia.

16.2.2 Ontario

According to a recent study,[119] there are 580 administrative agencies in Ontario. A study of 91 of the agencies found the following:

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[119] *Directions: Review of Ontario's Regulatory Agencies, Queen's Printer for Ontario; Toronto, Ontario, September, 1989.*

(a) 50% of the agencies feel their legislation needs amendment;

(b) only 40% of the agencies have published rules and a large number have no rules at all;

(c) only 30% have manuals of operation and only half of these are available to the public;

(d) appointments range from one year to three years (approximately 50%), from five years to "at pleasure" (approximately 30%) or are "at will", and some contain no term at all;

(e) the agencies estimate that it takes 18 months to become a fully active member;

(f) approximately 60% of the agencies hold public hearings, for an approximate total of 15,000 per year.

16.3 Tribunals Generally

16.3.1 Functions

Administrative bodies are created for a wide variety of purposes that may be grouped as follows:

(a) investigation and advice to government;

(b) appellate functions from bureaucratic decisions;

(c) adjudication of problems between individuals or between individuals and the government;

(d) regulation of economic activities;

(e) land planning, assessment and evaluation;

(f) regulation of employment, wages, pensions and social assistance;

(g) setting of standards and quotas (such as marketing boards).

16.3.2 Tribunals and the Courts

Taken as a whole, the volume of cases and variety of tasks assigned to administrative bodies far exceeds that given the courts, but the courts enjoy higher status.

There are at least four reasons for this: (a) the courts are far older than administrative tribunals; (b) the courts are a branch of government unto themselves, while tribunals are part of the executive branch; (c) there are far more tribunals than there are courts; (d) the courts "supervise" the tribunals.

The result is that tribunals are significantly under-resourced as compared to the courts. The quality of appointments is uneven and the work is often seen as relatively unimportant. Tribunals, then, are the neglected element of the adjudication and decision-making process.[120]

The fact is that tribunals deal with matters that are as complex and significant as all but the most fundamental constitutional cases. The four "reasons" we have given for tribunals' lower status explain but do not justify the result. What have age and constitutional arrangements to do with needs and status?

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[120] *One needn't go very far to find evidence of this. The primary mandate of our Task Force is the court system, but it is clear that administrative law and tribunals, taken as a whole, are in far greater need of attention. Of course we cannot be too critical because we, in turn, have spent relatively little time on administrative tribunals.*

The supervision exercised over tribunals by the courts is largely confined to procedural matters. Decisions made by a tribunal acting within its jurisdiction are usually not open to judicial review. So, as regards the big public policy questions, the terms "superior" and "inferior" are wholly misleading.

Supervision by the courts creates the impression that the tribunals are less worthy of attention and allocation of resources; tribunal decisions that, from a public policy point of view, are desirable and effective can be overturned because of procedural errors; and, not surprisingly, the courts tend to mould agencies into their own image, which is not always appropriate.

These criticisms must be tempered by acknowledging that at least the courts have not neglected tribunals. Court-like procedures may not always be appropriate but they work and they are imposed for want of something better.

There are no uniform powers and practices for administrative tribunals or minimum protections for parties except as are provided by the common law. The members of these agencies are often part-time, untrained and unfamiliar with the practices required by administrative law. Few of them have access to independent legal counsel. Few tribunals publish rules of practice. The Task Force was told that decisions of some tribunals are difficult to find. Certainly there is no central repository for rules, decisions and other directives issued by agencies.

16.4 Specific Problems

Our mandate directs us to consider the restructuring of courts. We take a functional approach so we believe a review of administrative tribunals performing an adjudicative function should be part of any overall review of the court structure. We have commented generally on the need for greater attention to be paid tribunals by the Legislature and the Provincial Government. This may be difficult in these times of financial restraint, but there are three specific problems relating to court review of administrative decisions that can be addressed without significant new expenditure.

16.4.1 Review and Appeal: Uniformity

The first difficulty is the lack of a standard procedure for judicial review of tribunal decisions. Ideally, similar decisions from similar tribunals ought to be reviewed by one court using uniform criteria. As it is, decisions of different administrative bodies are likely to be reviewed by different courts using different criteria as dictated by different statutes. One brief we received pointed to the array of procedures for review of disciplinary decisions of professional governing bodies:

(1) A nurse first seeks review by the Board of Directors of the Registered Nurses' Association, and then *certiorari* in the Supreme Court, Trial Division.

(2) A lawyer appeals a resolution of a discipline subcommittee directly to the Appeal Division of the Supreme Court.

(3) A psychologist "appeals" a decision of the Board of Examiners in Psychology to a judge of the Supreme Court, Trial Division.

As the brief stated:

> *"Each of the three professionals will face different standards of review in the reviewing court. The nurse must show jurisdictional error, error of law on the face of the record, or breach of natural justice. The lawyer can ask the Appeal Division to 'make such order or give such direction as it shall deem fit and necessary in the circumstances', although some palpable error must be shown. The psychologist will receive something akin to a hearing de novo and so*

need not show any error at all."[121]

The reviewing court can vary from Provincial Court judges to the Appeal Division of the Supreme Court. There does not always seem to be a rational basis by which the appropriate court is chosen.

In addition, appeal procedures tend to vary considerably. Some are very specific while others are quite general. Judicial interpretation of such provisions has added to the uncertainty.

One remedy would be the enactment of an *Appeals Procedure Act* that sets out the procedure to be followed unless otherwise legislated.[122]

16.4.2 Review and Appeal: Complexity

A second procedural difficulty is that, in Nova Scotia, if the statute which governs the operation of a particular administrative board does not specify an appeal process, judicial review of a decision is by way of prerogative remedy. The most common prerogative remedies are Certiorari, Prohibition and Mandamas. Unfortunately, the law of judicial review is notoriously difficult and complex with several pitfalls in the way of the person seeking relief, not the least of which is the difficulty of choosing the appropriate remedy. Other provinces have simplified things greatly by providing a single statutory remedy to replace prerogative remedies, in the form of an application for judicial review. Serious consideration should be given to the possibility of providing the same simplification in Nova Scotia.

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[121] *These useful examples were contained in an excellent brief by Mr. Graham Steele.*

[122] *This has been proposed in British Columbia by the Report of the Justice Reform Committee, Recommendation 114.*

16.4.3 Procedures

A third difficulty involves the lack of uniform procedural standards by which administrative tribunals conduct themselves. Although most tribunals in Nova Scotia are given the power to make their own procedural rules by their authorizing statute, not all do so and those that do often create a diversity of procedural rules. A nice balance is required between simplicity and flexibility (no rules or individually tailored rules of procedure) on one hand and certainty and fairness (uniform rules of procedure) on the other.

In the absence of statutory rules of procedure, a common law standard of natural justice applies. Although generally understood to include the idea that the decision maker will hear both sides before reaching a decision and will remain unbiased, there are difficulties with the application of this standard because of its generality. Thus it seems to us there is a distinct need for statutory rules setting out minimum procedural standards that must be observed by tribunals.

16.5 Conclusion

Although we have identified several problems associated with the current functioning of administrative tribunals, they are problems that will take time to research and resolve. The Task Force does not have that luxury. However, because administrative agencies constitute such an important and growing part of our legal system we believe the problems identified here deserve thorough investigation by some objective research directed body. We hope the newly created Law Reform Commission[123] will take on, as one of its first major tasks, a review of the functioning of administrative boards and agencies in Nova Scotia with particular emphasis upon the problems discussed here.

Recommendation 54

The Attorney General should ask the Nova Scotia Law Reform Commission to develop draft legislation that:

(a) standardizes the powers and procedures of administrative tribunals;

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[123] *S.N.S., 1990, c. 17.*

(b) guarantees parties appearing before the tribunals basic procedural rights and safeguards;

(c) simplifies administrative law, particularly with regard to judicial review and appeals;

(d) ensures the requisite degree of independence when a tribunal is required to act in a judicial fashion.

17. MASTERS AND REFEREES

17.1 Office of Master

Originally a master was an official in the Court of Chancery who functioned as a clerk of the court. With the fusion of the common law courts and the Courts of Equity, masters became Masters of the Supreme Court.

17.1.1 Current Functions

Today, in some jurisdictions, the master is a court official, usually full-time, who has a broad range of powers. A master can dispose of a variety of chambers applications relating to practice and procedure as well as conduct proceedings on references relating to such matters as partitions of property, the judicial sale of property, receiverships, the winding up of corporations, the foreclosure of mortgages, estate matters, incompetency proceedings and, in Ontario, the trial of mechanics lien and other actions pursuant to a reference by a judge of the Supreme Court.

The Supreme Court of Canada has outlined the jurisdiction of a master in the following way:

> *"The Master has no jurisdiction in trials or in appeals and all his acts are subject to review by a judge. His office is essentially that of an officer preparing litigation for its legitimate purposes, viz a trial of the rights of the parties which is exclusively reserved for the judges to whom it essentially belongs. His duties, therefore, while largely judicial in their character, do not constitute him a judge, since from them are reserved the essential duties of a judge."* [124]

So masters are not judges although they deal with much of the preliminary legal work that eventually leads to a trial before a judge.

In Nova Scotia, Section 23 (6) of the *Judicature Act* provides that:

> *"A reference in any enactment to a Master of the Supreme Court is a reference to a Local Judge of the Trial Division."*

This means that if any statutory provision in Nova Scotia gives a master authority to do anything it really means a County Court judge acting as a Local Judge of the Supreme Court. Section 40 of the *County Court Act* makes this clear by providing:

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[124] *A.G. Ont. & Display Services Co. vs. Victoria Medical [1960] SCR 32, 43.*

> *"The Judges of the County Courts acting as Masters of the Supreme Court, are deemed to have had jurisdiction to hear applications, make orders and transact all other business and exercise all such authority and jurisdiction as under the Judicature Act or the rules and practice of the Supreme Court may be heard, made, transacted or exercised by a Judge of the Supreme Court of Chambers in respect of the sale of land of lunatics or infants or the sale of land in actions for foreclosures and sale."*

We have been advised by the Chief Justice of the Trial Division that County Court judges have not, in the past, been used as masters because of uncertainties as to their workload and due to a lack of funds with which to pay them. Merger of the Supreme and County Courts will resolve both of these difficulties.

The only masters actively functioning as such are the taxing masters appointed under the *Taxing Masters Act* [125] who determine the amount of "costs" in a proceeding. "Costs" usually means the amount a losing party must pay the winning party, in addition to the award of damages, representing the cost of bringing the action (i.e. legal and expert fees, disbursements, etc.).

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[125] *R.S.N.S. 1989, c. 459.*

Masters have been used extensively in Ontario since 1923 where they hear nearly all civil matters heard by a Judge in Chambers. In British Columbia, masters have powers that are broad enough to allow them to handle at least 40% of the applications now being heard by the Supreme Courts and County Courts (prior to merger) including interlocutory applications involving family matters.[126] Masters have also been used in Alberta for thirty years.

17.2 Proposals for Reform

17.2.1 British Columbia

The B. C. Access to Justice Report estimates that the equivalent of ten County and Supreme Court judges of a total of approximately eighty judges are committed to chambers work on a daily basis.[127] It is contended that chambers applications could be more efficiently handled by masters dealing with them on a daily basis. The present use of judges to do this work did not, in the opinion of the B. C. Task Force, represent an efficient use of judicial time. They suggested the following reasons for increased use of masters:

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[126] *Access to Justice: The Report of the Justice Reform Committee, 1988 at p. 148.*

[127] *Ibid., at p. 147.*

(1) Masters can be more readily accessible during the day for emergency applications than are judges who have trial responsibilities.

(2) Because they are dealing with interlocutory matters on a daily basis, they should become more efficient than judges who handle chambers work only sporadically.

(3) a small number of masters dealing regularly with interlocutory applications should develop a more consistent approach. This should lead to more predictable results and should lead to a reduction in the number of applications.

17.2.2 Ontario

It is interesting to note that while B. C. is planning to expand its use of masters, Ontario has decided to discontinue the use of masters. There are two reasons for this decision:

(a) it would be too expensive to appoint masters across Ontario (they are currently used only in Toronto);

(b) representations made to the Attorney General that all steps in a case, including motions, should be dealt with by a judge.

The controlling reason seems to be a financial one. The Province has to pay for Masters at the salary level of a Provincial Court judge whereas the Federal Government pays federally appointed judges.

17.3 Possible Tasks

The Chief Justice of the Trial Division suggests appointment of one full-time master in Halifax and a part-time master in Sydney.[128] They might hear motions, bankruptcies, and certain types of chambers applications. Currently, bankruptcy hearings are held by the Registrar in Bankruptcy, Mr. A. Martin Smith, Q. C., who is also Prothonotary of the Supreme Court. He has also suggested that a master do this work. It might also be possible to have a master deal with mechanics lien actions as is done in some other jurisdictions.

Latest statistics from the Supreme Court show that between January and June, 1990, 82 special time (that is, contested matters of some complexity) chambers applications were heard. Family matters accounted for 15% of this, matters such as ceriorari, prohibition, mandamus, bankruptcy, expropriation, bail review and Charter applications represented 29% of the applications. Miscellaneous matters accounted for 56%. As of the date of September 6th, a delay of four weeks exists for routine chambers matters and two months for complex matters.[129]

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[128] *Oral submission to the Task Force by Chief Justice Glube.*

Other statistics show the significant number of chambers applications that are currently heard by both Supreme and County Court judges. If, as in British Columbia, 40% of this work could be done by masters, the question arises whether there would be enough trial work left for the judges of the merged court to keep them reasonably occupied.

As a matter of policy, it would seem to make good sense to have masters handle general chambers work (with the exception of family matters, which we think should be dealt with by Family Division judges). Masters can deal effectively and efficiently with most chambers matters, thereby saving judges for more important judicial work. However, accurate and complete information regarding judicial workloads at the Supreme and County Court levels is not sufficient to allow us to reach firm conclusions regarding the need for masters at this time. Our best assessment of the situation suggests that with a full complement of Supreme and County Court judges there is no need for masters to be appointed at this time.

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[129] *Report of the Coordinator of Supreme and County Courts, G. G. Pohlkamp, January to June, 1990 (September 6, 1990), p. 20.*

17.4 Conclusion

Although the use of masters to relieve the judges of superior courts of much preliminary procedural work makes good sense as a general proposition, it does so only if the judiciary's time is fully utilized. With the merger of the Supreme and County Courts, it will be some time before an accurate picture of the resulting judicial workloads becomes clear. More efficient utilization of judicial time may very well mean that masters will not be needed. Mechanics lien actions can be heard by those members of the County Court who hear them now if this is deemed advisable. In the same way, some judges of the new court may wish to acquire some experience and expertise with bankruptcy matters. However, we repeat, family law matters should be heard by Family Division judges and not masters.

Recommendation 55

We agree in principle that the use of masters makes good sense but, in light of the uncertainties surrounding present and future judicial workloads at the Supreme Court level, we do not recommend the appointment of masters at this time.

17.5 Functions of Referees

17.5.1 General

Referees are officials to whom questions of fact are referred either by the court on its own initiative or by one of the parties to a dispute. Their use is intended to help the judge sort out complicated factual situations which often involve a certain amount of technical knowledge and expertise. The hope is that by using a referee a better factual understanding off the case will be obtained by the court and time will be saved as well. The referee considers the evidence and reports back to the judge who can either accept, reject or vary the report.

In England, for over a century, judges have referred lengthy, technical or complicated cases to referees to sort out factually. These officials have devised special procedures and gained expertise in particular areas such as construction disputes. In some provinces, court officials such as clerks are designated as official referees while those appointed by the court are referred to as ordinary referees.

Things a judge could ask a referee to do:

(a) sort out complicated accounts in a mortgage or partnership;

(b) investigate deficiencies or delays and resulting damages in a construction case;

(c) investigate and report on damages in a personal injury suit;

(d) investigate and report on the worth of loss of a going business;

(e) determine whether a vendor can make good title;

(f) investigate the means and needs of a spouse seeking maintenance;

(g) compute the lien fund and precise entitlement in a builders' lien action.

The referee does not adjudicate nor make decisions with regard to the law. The referee is a fact finder, an investigator who sorts out technical and complicated questions of fact.

17.5.2 Nova Scotia

In Nova Scotia, Rule 33(b) of the Civil Procedure Rules permits a court to order the assessment of damages, in whole or in part, to be referred to a referee or a Local Judge for inquiry or report under Rule 33.

Rule 35 is the general authority to appoint referees and outlines the powers of the referee and the procedure to be followed. It provides as follows:

35.01 (1) Where it is in the interest of any party, the court may, subject to any right to a trial with a jury, order a proceeding or any question, or issue of fact arising therein, to be referred to the person it appoints as a referee, with or without the assistance of assessors, for

(a) trial and report; or

(b) inquiry and report;

and the court may give such directions as it thinks just.

(2) The party who applies for a reference shall furnish to the referee a true copy of the order for the reference, and any documents directed therein to be furnished to the referee.

35.02 (1) Subject to any direction contained in the order for a reference, a referee shall on a reference, *(a) have the same jurisdiction as the court, other than for the issuance of a contempt order;*

(b) conduct the trial or inquiry of the reference as far as the circumstances permit, in a like manner as a like proceeding before the court;

(c) exercise the same powers as the court with respect to claims relating to or connected with the reference, including the right to order any counterclaim or third party proceeding to be struck out or tried separately;

(d) hold the trial or inquiry of the reference before him at any convenient time and place with power to adjourn the same as he thinks just;

(e) when requested by any party in writing or on its own motion, obtain by an application in chambers the opinion of the court upon any matter arising during the court of the reference.

(2) The provisions of the Rules shall, with any necessary modification, apply to a trial or inquiry by a referee.

In addition, Rule 12.04 (2) allows a party to apply for a referee to be appointed to determine the amount due on a mortgage and to take an account and Rule 59.54 allows a court to refer to and delegate any of the power of the court in relation to the winding up of a company.

Pursuant to Civil Procedure Rule 57.30, applications may be made to a Family Court judge functioning as a referee to vary, rescind or suspend an order for corollary relief pursuant to a divorce action in the Supreme Court. The Supreme Court deals with the report of the Family Court judge in the same manner as a report of a referee as provided in Rule 35.03. In the event that a Family Division of the Supreme Court is established, there will be no need for Family Court judges to act as referees.

17.6 Proposals

The Alberta Law Reform Institute Report on Referees[130] states:

> *"The use of referees has great potential for improving the efficiency of the administration of justice .... referees free the time of judges by taking on lengthy cases involving the review of many transactions. The use of referees allows greater freedom to schedule cases that involve frequent adjournments or extend for many weeks. This flexibility should help eliminate backlogs and delays in the courts."*

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[130] *Research Paper #18, February, 1990.*

The Alberta report emphasizes the flexibility that the use of referees allows. Sporadic backlogs caused by longer, complex cases might be more easily dealt with than by adding more judges to the court. The referee can also keep charge of a case and hear it in stages if necessary. Not being required to go on circuit, the referee is available on a consistent basis. However, the most important benefit to be gained by the use of referees is the added assurance that the correct factual base for the case will be laid.

17.7 Conclusions

Although there are decided advantages in the use of referees, they do not appear to be used much in Nova Scotia. We suspect that judges are reluctant to impose them because of the added cost. For the same reasons, perhaps, lawyers are reluctant to apply for their use although willing to use costly expert witnesses. Our Civil Procedure Rules are not as clear as they might be about whether individual litigants can have a referee appointed or whether the judge alone has the discretion to do this. The process envisaged by the rules seems to be one where a party to the dispute thinks that a referee would be a good idea and makes an application to that effect to the judge. But it seems to be at the judge's discretion whether an order is issued appointing someone as the referee. It is not clear who pays for the referee either.

Greater use of referees by parties to an action even if they pay for it would in some cases seem prudent. If there is any chance that the judge may not be able to arrive at an accurate understanding of complicated factual issues it would seem to be in the interests of both parties to ask for a referee in the hope that accurate factual conclusions could be reached. If this results in a faster conclusion to the case, all the better, but the main objective is to make sure that the case is understood and clear on its facts.

Accountants are the professionals most likely to be used as referees under current conditions but there seems to be no reason why other experts and professionals such as engineers, surgeons, scientists, etc. should not be used as well. This has occurred in British Columbia but not elsewhere to date. Since the Task Force has already received a proposal to create a land court because of the many complex problems that arise in land disputes in relation to boundaries, it seems reasonable to think about the greater use of surveyors as referees in this kind of case.

Recommendation 56

Greater use of referees should be made by courts and litigants in selected, suitable cases. In particular, surveyors should be used as referees in land dispute cases involving boundary questions.

Recommendation 57

Courts ought to consider the use of a broad range of technically trained referees to assist them with complex, technical questions of fact.

18. ROLE OF CHIEF JUSTICES AND CHIEF JUDGES IN THE MANAGEMENT AND ADMINISTRATION OF COURTS OF ALL LEVELS

18.1.1 Introduction

Our general approach to the task of court restructuring has been to emphasize simplicity of structure with as much flexibility as possible so as to allow for effective management and control. A new structure will not avoid the need for efficient management, but the managers must have authority and the will to manage. The most effective use of judicial human resources presupposes managers who are empowered to direct the employment of those resources. If our recommendations for court restructuring are followed, the Supreme Court of Nova Scotia, with its Family Law Division and merged County Court, will increase significantly in size and function as will the need for administration and management. These latter functions will fall squarely on the shoulders of the Chief Justice of the Supreme Court, who will assume much of the responsibility for making the new arrangements work smoothly and effectively. If that responsibility is to be handled adequately, the Chief Justice must have authority to make the necessary management decisions.

18.1.2 Powers of the Chief Justices and Chief Judges

At the present time, the Chief Justice of Nova Scotia and the Chief Justice of the Trial Division must manage by consensus in light of Section 20 of the *Judicature Act*, which states that "except where it is otherwise expressly provided, all the Judges of the [Supreme] Court have, in all respects, equal power, authority and jurisdiction." The Chief Judges of the Family, Provincial and County Courts of Nova Scotia are all given at least general supervisory powers in respect to other members of their court.

18.2 Conclusion

If the new Supreme Court of Nova Scotia is to function effectively, the Chief Justice must be given the authority to manage. It is necessary, therefore, to enhance the present power (what little there is). The *Judicature Act* should be amended to give the Chief Justice the authority to assign work and dispatch judges to hear cases around the province. Either the Chief Justice or an Associate Chief Justice would be assigned supervisory responsibility for the Family Division. In addition, the Chief Justice should be supported by an administrator who would have senior status in the Attorney General's Department, but who would report to the Chief Justice of the Trial Division.

These same considerations, insofar as they relate to the power and authority of the Chief Justice, apply to the Chief Judges of the Family, Provincial and County Courts. The extent and details of their power varies at present. Chief Judges should have the same powers in respect of their courts as we recommend for the Chief Justice of the new Supreme Court.

Recommendation 58

The Chief Justices of the new Nova Scotia Court of Appeal, the Supreme Court of Nova Scotia and the Chief Judge of the Provincial Court (or, the Chief Justice of the Trial Division of the Supreme Court and the Chief Judges of the Family, Provincial and County Courts) should be given the following authority by statute:

POWERS AND CHIEF FUNCTIONS OF THE CHIEF JUDGE (JUSTICE)

(1) The Chief Judge (Justice) shall be responsible for the judicial functions of the court and, without limiting the generality of the foregoing, shall have the power and exercise the duty to:

(a) supervise and direct the sittings of the court;

(b) coordinate, apportion and administer the work of the judges;

(c) designate the case or matter, or class of cases or matters in which a judge shall act;

(d) assign a judge to the duties the chief judge (justice) considers advisable;

(e) assign circuits for each judge having regard to the need for circuits and the availability of suitable facilities and court staff;

(f) approve times of vacation, leaves of absence, sick leave, and continuing education;

(g) designate the court facility where a judge shall act;

(h) designate places other than a court facility, where the court may sit and a judge shall act;

(i) order that a matter be reheard or, with the consent of counsel, continued before another judge, where a judge (i) for any reason fails to complete a hearing or, (ii) having completed a hearing, fails to render a judgement;

(j) ensure proper judicial behaviour is observed;

* (k) review any matter concerning the conduct of a judge which comes to the attention of the Chief Judge, including a complaint, and

  (i) attempt to resolve a complaint informally,
  (ii) advise a complainant that there is no basis for the complaint,
  (iii) refer the complaint to the judicial inquiry board, or
  (iv) upon receipt of a recommendation by the judicial inquiry board, to suspend a judge or require a judge to take a leave of absence, with or without pay, for the purpose of obtaining remedial treatment or instruction;

(l) establish general policy for the court in respect of the matters enumerated herein;

(m) exercise the other powers and perform other duties prescribed for the Chief Judge (Justice) by the Lieutenant Governor in Council.

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* applies only to provincially appointed judges.

(2) The Chief Judge (Justice) may delegate to an Associate Chief Judge (Justice) such of the powers enumerated in subsection (1) as the Chief Judge (Justice) considers appropriate.

(3) An Associate Chief Judge (Justice) shall assist and advise the Chief Judge (Justice) and shall carry out duties delegated pursuant to Section 2 or otherwise assigned by the Chief Judge (Justice).

(4) Subject to the provisions of the Act, a judge shall comply with orders and directions given pursuant to this Section.

19. DISCIPLINE OF PROVINCIAL JUDGES

19.1 Introduction: Judicial Councils[131]

Judicial Councils have existed in Canada since 1968 and in Nova Scotia since 1980.[132] At present all provinces except Prince Edward Island have established Councils in different ways. Five of the nine Judicial Councils play a role in the appointment process, while in Nova Scotia this is currently being done by a separate body.

Where the Council is involved with appointments, most members consider that the Council exists primarily to improve the quality of appointments, by reducing the overtones of "political patronage" as well as raising the objective quality of new appointments. The function of the Council in discipline matters is seen as a way (1) to maintain efficiency and competence in the Provincial judicial system and (2) to assure the public that there is a forum to consider complaints against judges and (3) as a means of protecting the judges from the effects of unfounded complaints.

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[131] *This chapter is drawn for the most part from a comprehensive report of the Law Reform Commission of Manitoba on Judicial Councils prepared in 1989. We found the language and style in this report most attractive, and while in a number of areas we depart from their conclusions, we are much in their debt for our use of their work.*

[132] *S.N.S. 1980, c. 60.*

19.2 The Current Situation

19.2.1 Provincial Judges

Our provincial judges are appointed by the Governor in Council in Nova Scotia to the Provincial Court or the Family Court. The courts are maintained and administered by the Departments of Community Services or the Attorney General. Judicial administration is done by the Chief Judge of each court pursuant to their respective statutes and regulations.

All Provincially appointed judges hold office during good behaviour and not at pleasure, by virtue of the Statutes setting up the courts. This is the modern statutory expression of the Act of Settlement of England in 1701 designed to insulate the judges from the Executive. Prior to the amendments to the *Family Court Act*[133] and the *Judges of the Provincial Court Act*[134] in 1980, a judge could be removed from office upon address by the Executive to the Legislature. Breach of the good behaviour standard is considered to be (1) an improper exercise of the office, (2) neglect or refusal to perform judicial duties, or (3) conviction for a criminal offence involving moral turpitude. It does not include mental or physical illness or off the bench behaviour (unless a crime).

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[133] *R.S.N.S., 1967, c. 98.*

[134] *S.N.S., 1978-79, c. 48.*

In Canada, only Prince Edward Island has no Judicial Council. There is one for Federally appointed judges. In Nova Scotia, the Judicial Council consists of:

The Chief Justice of Nova Scotia

The Chief Justice of the Trial Division

The President of the Bar Society or nominee

The Chief County Court Judge or nominee

The Chief Judge of the relevant Court or his nominee

The Chief Justice of the Province is the Chairman.

19.2.2 The Discipline Process

The first in line to deal with complaints from the public is the Chief Judge. In the case of the Family Court, the powers of the Chief Judge are clearly set out in the regulations and are adequate to permit judicial administration. They also allow better control of the judges than is the case in the Supreme Court. In general, these regulations appear to be satisfactory, except there is no power to allow the Chief Judge to seize a file from a judge.

The Chief Judge can suspend a judge for misbehaviour, neglect or inability, but must then request the Judicial Council to investigate. The Judicial Council must then investigate and adjudicate in camera. It makes its own rules of procedure and can discipline or suspend as it considers appropriate or recommend to the Governor in Council that the judge be removed from office.

This system is essentially a one-tier system (as are all Judicial Councils at the present time), with a single board carrying out the combined functions of investigating complaints, bringing the charges, holding the hearings and making findings of fact.

19.3 A New Disciplinary Procedure

19.3.1 Separation of Functions

A multi-level system is really needed, more like the complaints procedure of the Barristers' Society. The first level investigates and decides whether or not to lay formal charges. The second level does the adjudication and disposes of the matter.

Recommendation 59

There should be a clear division between the investigative/prosecutorial and the adjudicative functions in judicial discipline proceedings and the two functions should be dealt with by different bodies.

To achieve a clear distinction between the two functions, no one receiving complaints should be taking part in the adjudication of those complaints. This would mean that the Chief Judge, in almost all of the complaints, would be familiar with the matter and should not, therefore, be part of the formal investigation or the hearing. Also because the Chief Judge is not part of this process, he or she is and should be supervisor, leader and a confidant, and as such, can settle or mediate complaints of a less serious nature.

The second tier would be a new independent investigative body to whom the Chief Judge could turn with serious matters for investigation and perhaps prosecution. This body would also act to resolve matters that the Chief Judge could not settle, and in serious matters, accept complaints, particularly where the public perception is likely to be one of "whitewash". This board can be called the Judicial Inquiry Board.

19.3.2 Chief Judge

Recommendation 60

The *Judges of the Provincial Court Act* and the *Family Court Act* should be amended to establish a new judicial disciplinary process having three tiers:

(a) the Chief Judge;

(b) an investigative body (called the Judicial Inquiry Board) to investigate and prosecute more significant matters and, where requested, to consider complaints dealt with by the Chief Judge; and

(c) an adjudicative body (called the Judicial Council) to hear and determine charges brought by the Judicial Inquiry Board.

Recommendation 61

Complaints (other than those against the Chief Judge) should be directed to the Chief Judge of the relevant court and complaints respecting the Chief Judge should be directed to the Chief Justice of Nova Scotia who, for this purpose, has all the powers of a Chief Judge.

Recommendation 62

The Chief Judge should be empowered to deal with complaints by:

(a) attempting to resolve the matter informally;

(b) advising the complainant that there is no basis for a complaint or that a more appropriate avenue should be pursued (such as an appeal from the judicial decision giving rise to the complaint);

(c) referring the complaint to the Judicial Inquiry Board; or

(d) on the recommendation of the Judicial Inquiry Board, suspending a judge (with or without pay) or requiring a judge to take a leave of absence (with or without pay) for the purpose of obtaining remedial treatment or instruction.

Recommendation 63

A complainant or judge who is dissatisfied with the disposition of the complaint by the Chief Judge should be entitled to take the matter to the Judicial Inquiry Board.

Recommendation 64

The Chief Judge ought to be required to inform all complainants that, if they are dissatisfied with a disposition of the complaint by the Chief Judge, they may take the matter to the Judicial Inquiry Board.

Recommendation 65

Complaints to the Chief Judge and the Judicial Inquiry Board must be in writing and signed by the complainant.

Recommendation 66

The Chief Judge should be empowered to review, on his or her own initiative, any matter regarding the conduct or fitness of a judge which comes to his or her attention; and the Judicial Inquiry Board ought to have the same power.

19.3.3 The Judicial Inquiry Board

The second tier of our recommended judicial disciplinary process is the Judicial Inquiry Board. This is the body which will have primary responsibility for investigating major complaints, laying charges where appropriate and prosecuting them before the Judicial Council. In order for it to operate quickly and effectively, we believe that it should be composed of a small number of persons. Furthermore, it should be representative of the perspectives of the public, the legal community and the judges themselves, without being dominated by any one of these points of view.

Recommendation 67

The Judicial Inquiry Board should be comprised of three persons:

(a) a lawyer appointed by the Lieutenant Governor in Council;

(b) a person who is not a lawyer, judge or retired judge, also appointed by the Lieutenant Governor in Council; and

(c) a judge named by the Provincial Court judges or the Family Court judges. This member shall not be the Chief Judge. In the event

> **that this member becomes the subject of a complaint to the Judicial Inquiry Board, he or she shall be replaced by another person named by the relevant judges until the complaint is disposed of.**

The Judicial Inquiry Board should be permanently established, ready and able to receive complaints against judges at any time. It is equally important to prevent the members of the investigative body from serving overly lengthy terms which might diminish both their interest in and the effectiveness of the disciplinary process. More significantly, acting as a prosecutor of judges will be a difficult and taxing responsibility, which ought to be rotated over time. In light of these concerns, the terms of appointment of the members of the Judicial Inquiry Board should be limited, and those members should be eligible to have their terms renewed once only.

Recommendation 68

Members of the Judicial Inquiry Board should hold office for terms of two years and continue to hold office pending disposition of any matter extending beyond the term.

Recommendation 69

Members of the Judicial Inquiry Board may have their terms renewed twice only.

Recommendation 70

Members of the Judicial Inquiry Board and persons who are employed or retained by them as investigators should have all of the powers, privileges and immunities of a Commissioner under the Public Inquiries Act.

Recommendation 71

The Judicial Inquiry Board should have the power to engage counsel and agents as they determine appropriate.

In a two-tier (or, in our case, three-tier) disciplinary system, the investigative body (the Judicial Inquiry Board) is usually unable to impose private or informal sanctions (i.e. dispose of the matter on its own). The reason for this is that the investigative board is generally limited to investigating, not disposing of cases; only the adjudicative board can dispose of cases after formal charges are filed. Private or informal sanctions may be abused. Secrecy fosters flexibility but it also increases the risk (and certainly the perception) of favouritism and inconsistent application of standards. While secrecy may foster flexibility in the disciplinary process, it also increases the risk of abuse that the members of the Judicial Council themselves may not be able to either perceive or control.

Therefore, we feel that the Judicial Inquiry Board should not be able to impose private dispositions on the parties unless both the complainant and the judge involved consent. The requirement of the complainant's consent alleviates the risk of abuse (if the complainant feels the disposition is lax or biased, he or she need only refuse it) and it protects the judge against arbitrary or unreasonable decisions by the investigative body. Furthermore, consent is a useful device in borderline cases. If the complainant is being unreasonable, and refuses a fair or appropriate disposition, the Judicial Inquiry Board may elect simply not to lay charges against the judge. Conversely, if the judge is being unreasonable, and does not accept the sanctions proposed by the Judicial Inquiry Board, he or she may find that charges are filed and the matter is proceeding to an inquiry before the Judicial Council.

Recommendation 72

Upon receipt of a complaint (or upon initiation of an investigation on its own motion), the Judicial Inquiry Board should have the power to:

(a) investigate the matter;

(b) informally resolve the matter, if it can obtain the agreement of the judge in question and the complainant (where there is one);

(c) lay charges of misconduct before the Judicial Council;

(d) not lay charges;

(e) prosecute charges laid;

(f) stay charges; and

(g) refer the matter to the Chief Judge with a report and recommendation of sanctions to be applied.

As recommended earlier, the Judicial Inquiry Board is to be composed of three members, each representing the interests of different groups. It is not necessary that their decisions be unanimous; the decision of a majority of the members of the Board should be sufficient.

Recommendation 73

Decisions of the Judicial Inquiry Board can be made by a majority of its members.

In order to prevent unwarranted damage to a judge's reputation, investigations by the Judicial Inquiry Board should be confidential and its deliberations as to whether to lay charges should take place in camera.

The key point of the system is complete separation of investigation from adjudication. Responsibility for the investigation of complaints and laying or not laying of charges is vested in one independent and impartial body. It is essential that the decisions of this body not be interfered with or influenced.

Recommendation 74

The decision to lay charges, not lay charges, or stay charges shall be within the sole discretion of the Judicial Inquiry Board and no appeal shall lie from such decisions.

Finally, it is important, in situations where the Judicial Inquiry Board elects not to lay charges, that the complainant be informed of this and that he or she receive an explanation. After all, the silence of the Judicial Inquiry Board could be interpreted by members of the public as a suppression of the complaint, a "closed door" disposition. While these reasons need not be lengthy, it is essential that they state the basic reason for not proceeding (for example, minor matter, insufficient evidence, matter properly dealt with via the appeal route, etc.).

Recommendation 75

Where the Judicial Inquiry Board decides not to lay charges against a judge, it shall give a written explanation of its decision to the complainant.

19.3.4 The Judicial Council

The Judicial Council would be the body which adjudicates on charges brought by the Judicial Inquiry Board against provincial judges. All of Canada's Judicial Councils contain as members at least one judge, at least one lawyer and, except in Nova Scotia, at least two lay persons. Nova Scotia appoints all of its members by office, being the two Chief Justices, the Chief County Court Judge, the Chief Judges of the relevant provincial courts, and the President of the Bar Society.

The first change relates to the membership from the provincial judiciary. The body which has the greatest understanding of the circumstances facing the provincial judiciary (and the problems which the judges of that court may encounter) is a body which is representative of the provincial judiciary itself. That is, the provincial judges should be able to select their representatives on the Judicial Council from their own ranks.

The major change in the composition of the Judicial Council recommended in this report is the addition of two lay persons to the Judicial Council to be appointed by the Lieutenant Governor in Council. The argument for the admission of non-judges and non-lawyers to the board that judges judges, is not only the appearance of public representation, but the history of the good experience of the Bar Society with their lay members on the discipline committees and the experience of other provincial Judicial Councils.

However, the number of lay persons on the Judicial Council should not be so great so as to provide those persons or any other group with a majority membership. Therefore, the quorum for the Judicial Council should be large to prevent any one group from constituting the majority of members actually present at the adjudication of complaints.

Recommendation 76

The Judicial Council should be composed of seven persons, namely:

(a) the Chief Justice of Nova Scotia, or another judge of the Court of Appeal designated by him or her;

(b) the Chief Justice of the new Supreme Court (or the Trial Division of the Supreme Court as the case may be), or another judge of that Court designated by him or her;

(c) two judges of the same court as the accused judge, named by the judges of that Court;

(d) the President of the Nova Scotia Barristers' Society or his or her designate;

(e) two persons, who shall not be lawyers, judges or retired judges, appointed by the Lieutenant Governor in Council.

Recommendation 77

The quorum for the Judicial Council should be five, of whom one shall be a judge of the same court as the accused judge and one shall be a lay person.

Recommendation 78

The following persons should not be members of the Judicial Council:

(a) the Chief Judge of the same court as the accused judge; and

(b) any sitting member of the Judicial Inquiry Board.

Recommendation 79

Any person who has participated in the receipt of investigation of a complaint against a judge of the Provincial Court shall not participate as a member of the Judicial Council in any proceeding of the Judicial Council respecting that complaint.

Recommendation 80

The Chief Justice of Nova Scotia or his or her designate should chair the Judicial Council.

We have already recommended the use of specific terms of appointment for members of the Judicial Inquiry Board. The reasons for change (to prevent stagnation of the Council membership, and to avoid placing such an onerous responsibility on individuals for excessive periods of time) are as applicable to the members of the Judicial Council as they were applicable to members of the Judicial Inquiry Board (except, of course, for those members who serve *ex officio*).

Recommendation 81

The term of office of the members of the Judicial Council who do not sit ex officio (the lay people and the provincial judges) should be three years.

Recommendation 82

The members of the Judicial Council who do not sit ex officio should be eligible to be reappointed once only.

19.4 Procedural Matters

19.4.1 Suspension of Judge Pending Investigation or Inquiry

We are of the opinion that there should not be any provision for suspension upon the making of a complaint or during an investigation. First (and most importantly), if the investigative body were permitted to impose such a sanction, it could easily appear to the public (and others) as a predetermination of guilt. Secondly, the Task Force feels that allegations which appear to require immediate action can best be dealt with in other fashions, at least at this early stage. For example, the Chief Judge could assign the judge in question to administrative or other non-judicial duties until the investigative body has made its decision as to the filing of charges. Furthermore, since it would only be very serious allegations against judges which might warrant some form of early action, it is likely that the investigative body would quickly be notified of the allegations, through the police, the media or other sources. Therefore, the investigative body would likely take action forthwith, thus reducing the time between the occurrence of the alleged misconduct and the decision as to charges by the Judicial Inquiry Board. As a result, the need for interim suspension during investigation is correspondingly reduced.

Recommendation 83

There should not be provision for suspending a judge while an investigation into his or her conduct is pending. However, the Chief Judge is free to reassign such a judge to administrative duties.

Although we would rule out suspension of a judge during the investigation of a complaint, in our view, provincial judges should be suspended automatically upon the filing of charges by the Judicial Inquiry Board. The filing of charges indicates that an independent investigative body has decided that a sufficient basis exists (and the matter is serious enough) to proceed to an inquiry before the Judicial Council. This "screening" process substantially diminishes the risk that a judge will be suspended on groundless charges. Furthermore, the provision for automatic suspension protects the Judicial Inquiry Board and the disciplinary process from charges that a predetermination of guilt takes place (i.e. those judges who are suspended are guilty, but those who are not guilty are not suspended). At the same time, the Judicial Council is not placed in the difficult position of making a preliminary decision on the merits of a case which it will eventually be hearing in full.

Recommendation 84

Upon the filing of charges against a judge by the Judicial Inquiry Board, the judge should be automatically suspended unless the Judicial Inquiry Board waives the suspension.

Finally, we consider the issue of salary during interim suspension. Most of the jurisdictions we have surveyed provide for the continuation of salary during the suspension, subject to the discretion of some person or body (e.g. the Chief Judge of the Provincial Court of the Judicial Council) to order that the suspension be without pay.

We feel that interim suspension should be with pay. There has not yet been a formal inquiry into the judge's conduct at this point; it would be unfair (and a possible violation of the judge's right to financial security) to provide for cessation of salary merely upon the filing of charges against the judge. However, it is possible that, in a handful of situations, the charges against the judge may be so strong (and serious) that some consideration of suspension of salary is called for. Such consideration should not be by the Judicial Inquiry Board (which, having been responsible for the decision to lay charges against the judge, may be perceived as insufficiently objective to make decisions concerning the judge's salary). Furthermore, if consideration of suspension without pay is to be the responsibility of the Judicial Council, it is essential to provide that the Council member who makes such a decision be precluded from any further participation in the disciplinary proceedings against that judge. Therefore, only one member of the Judicial Council should consider the issue of suspension without pay. Otherwise, the numbers of the Council could be seriously reduced, if several members take part in the decision concerning salary, and are thereby prevented from further participation in the proceedings.

Recommendation 85

Unless a member of the Judicial Council (designated for the purpose by the chair of the Judicial Council) decides otherwise upon an application of the Judicial Inquiry Board, the suspension of a judge should be with pay.

Recommendation 86

The member of the Judicial Council who hears such an application for suspension of a judge without pay should be barred from further participation in the matter.

19.4.2 Proceedings in Public or in Camera

Provisions respecting the holding of Judicial Council hearings in public or in private vary considerably in Canada. Some jurisdictions hold inquiries in private, subject to the proviso (in some cases) that hearings may be public where the Council believes that it is in the public interest or that there are compelling reasons to do so. Other provinces allow the judge in question to choose between a public or private hearing.

Several reasons have been suggested in support of private hearings:

1. They encourage participation in the process by protecting complainants and witnesses from retribution or harassment.

2. They protect the reputation of innocent judges who are wrongfully accused of misconduct.

3. They maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct.

4. They protect members of judicial disciplinary commissions from outside pressures.

The responses to these arguments may be summarized as follows:

1. If secrecy encourages participation by complainants and witnesses in the process, surely this strength is diminished by the fact that numerous commissions have authority to disclose the identity of the complainant and any witnesses to the judge during the investigation. Furthermore, every commission allows a judge some measure of discovery power against witnesses (either during the investigative or adjudicative stage) and notice of the nature of the charges or provision of a written complaint to the judge in question is a routine feature of disciplinary proceedings. Therefore, even if the identities

of the complainants or witnesses are not actually disclosed, in many cases the judge will find it very easy to guess who they are (and if the matter becomes public, everyone will know who the witnesses are).

2. Although it is justifiable to provide privacy pending investigation of the alleged misconduct, the reasons are less compelling for continuing confidentiality beyond the commencement of formal proceedings, because at that point some kind of probable cause determination has taken place (i.e. the charges have been found to have a sufficient basis to require formal hearing). Therefore, by the point at which formal proceedings are commenced, the risk of unwarranted damage to reputation is substantially diminished.

3. There is a need to balance the judicial interest in avoiding undeserved damage to reputation with the strong public interest in obtaining information about possible judicial misconduct.

4. The argument that confidentiality bolsters confidence in the judiciary (much publicity about complaints against judges would lead the public to believe that the judiciary is incompetent) is subject to the rebuttal that keeping the public uninformed about such matters is certainly not in the public's best interest, and respect for the judiciary cannot be obtained by suppressing criticism of judges (the public suspects "whitewash").

5. There is no factual support for the implication that members of judicial commissions are in some way more vulnerable to influence or pressure than other government or judicial officials.

The current Nova Scotia legislation provides that "the proceedings of the Judicial Council shall not be public".

We are of the opinion that proceedings be held in private unless the accused judge wishes them done in public. Only if guilt is established is the decision of the Judicial Council made public.

Recommendation 87

Judicial Council hearings should be held in private unless the accused judge requests an open hearing.

19.4.3 Disposition of Complaints

In Nova Scotia, the Judicial Council has no power to remove a judge from office. The Council may dismiss a complaint, discipline the judge or suspend him or her. If a judge is suspended, the Lieutenant Governor in

Council (the Cabinet) may remove the judge from office and revoke his or her appointment (after either an appeal to the Court of Appeal is dismissed or the time for appeal has expired).

In our view, it is inappropriate that the decision on whether or not a judge is to be removed from office be left to the provincial Cabinet. First, it seriously undermines the credibility of the disciplinary process; why set up a new system emphasizing principles of fairness and natural justice when its decisions can be overturned by political considerations? Secondly, a system which leaves the ultimate decision on removal to the Cabinet, a body which need hold no hearings or otherwise listen to the judge's case, must surely contravene the constitutional requirement enunciated by the Supreme Court of Canada that, in order to remove a judge, there must be a process of independent review which affords the judge a full opportunity to be heard.

We believe that the power to remove a provincial judge must be vested either in the provincial Legislature or in the Judicial Council. The most powerful argument for vesting this power in the Legislature is that it is an elected body, accountable to the public for its actions. However, this is countered by several strong arguments to the contrary. First, a requirement for legislative action may politicize the disciplinary process. For example, judges appointed by a previous provincial government could, if faced with removal by the Legislature, find themselves the subject of harsh and possibly unfair scrutiny by the government of the day, simply because they were appointed by a government of another political persuasion. More importantly, the provincial Legislature is a wholly inappropriate forum for the process of independent review and full hearing mandated by the Supreme Court of Canada. The Legislature would have to suspend its ordinary business and convert itself into a quasi-judicial body, a role for which it is poorly suited.

We therefore conclude that the Judicial Council alone should be empowered to order the removal of provincial judges from office. However, an appeal to the highest court in the province, the Court of Appeal, should be provided for.

Recommendation 88

The Judicial Council should be empowered to dispose of matters heard by it in either of the following ways:

(a) by dismissing the complaint;

(b) by removing the judge; or

(c) where the judge is unable to perform the duties of his or her office by reason of disability, by ordering that the judge be deemed to have voluntarily resigned with full pension.

It is possible that a judge who is the subject of disciplinary procedures will resign or retire from office before those proceedings are complete. In that situation, should the proceedings continue? This is the so-called "moot complaint" issue. In some American jurisdictions, courts or commissions which hear judicial discipline cases have stated that mootness is not a defence. That is, the proceedings may be continued even after the judge retires.

Recommendation 89

The Judicial Council should have the authority to hear moot cases. The departure from office of a judge should not determine the jurisdiction of the Judicial Council in the matter.

Finally, we consider the question of appeals. We have already stated that there should be an appeal to the Court of Appeal from decisions of the Judicial Council. It should be noted that although the prototypical two-tier system found in the United States is often said to be completely segregated from the ordinary court system (i.e. there is not usually a right of appeal to the highest court in the jurisdiction), the reasons for this segregation are not relevant to Nova Scotia. The concept of the two-tier system was the result of a court scandal which struck the highest court of the State of Illinois. It was concluded that, in order to be effective, the "second tier" or adjudicative level had to be able to make final disposition of matters, without being subject to judicial review. The reasons for this were that the then-existing Courts Commission (the judicial disciplinary body) was controlled by the State Supreme Court, and this created problems when the judges in question were members of the State Supreme Court.

None of the above objections have any application to Nova Scotia. The Judicial Council is a provincial body which hears complaints against provincial court judges, not judges of Nova Scotia's superior courts. Therefore, even though a right of appeal is provided to the Court of Appeal, this could never result in that Court hearing appeals of disciplinary proceedings against superior court judges (those judges are dealt with by the federal judicial disciplinary process).

The requirement for an appeal to the Court of Appeal gives rise to several related issues. Who should be allowed to appeal? What may be appealed (conviction or disposition, or both)? What should the Court of Appeal be authorized to do on an appeal?

The Task Force has concluded that both the judge and the Judicial Inquiry Board should be allowed to appeal a decision of the judicial Council. In view of the sweeping new powers of disposition which we have recommended for the Judicial Council, it is only appropriate that both of the parties affected by the decisions of the Council have full rights of appeal against them.

For the same reason, we are of the opinion that the basis of appeals should not be restricted. The broad powers which we feel should be conferred upon the Judicial Council serve further to judicialize the disciplinary process; to complement the increased significance of the Council's decision-making powers, there should be a widely-based right of appeal. Therefore, appeals should be available in respect of either the Council's determination of guilt or innocence or the penalty imposed or both. We do, however, recognize that, as with other appeals heard by it, the Court of Appeal may generally be loath to substitute its discretion for that of the Judicial Council.

Recommendation 90

Both the judge and the Judicial Inquiry Board should be permitted to appeal a decision of the Judicial Council (as to guilt or penalty or both) to the Court of Appeal.

19.5 Grounds for Disciplinary Action or Sanctions

To this point, we have been concerned with the method by which complaints against provincial judges should be made and determined. We now consider the grounds upon which those complaints may be made.

The grounds of misconduct which allow persons to make complaints against provincial or territorial judges do not vary widely from one Canadian jurisdiction to another. In general, the usual grounds for complaints include:

- lack of competence
- misconduct or misbehaviour
- neglect of duty
- inability to perform duties
- conduct that is incompatible with the execution of the judge's office

Quebec is the only Canadian jurisdiction which has attempted to enunciate more specific guidelines. Its Judicial Council ("Conseil de la magistrature") is charged with the responsibility of developing a judicial code of ethics. The Conseil receives and examines complaints which allege that a judge has failed to comply with the Code of Ethics.

However, the Code of Ethics which it has developed is quite general in nature, referring only to obligations such as: "The judge should perform the duties of his office with integrity and honour", or "The judge should be, and be seen to be, impartial and objective".

The grounds for disciplinary action as outlined in our current provincial legislation are similar to those in use in other provinces. It would seem that guidelines are needed which would provide judges with a reasonably clear standard of conduct. Such guidelines could well be developed by the Judicial Council itself, or by the forthcoming Law Reform Commission.

Recommendation 91

The Judicial Council shall accord high priority to the development of a Judicial Code of Conduct, breach of which would be grounds for disciplinary action.

Recommendation 92

The Attorney General should not be treated differently from other complainants. Complaints by the Attorney General should be made and dealt with in the same manner as those of any other complainant.

Recommendation 93

The decision of the Judicial Council in any matter involving disciplinary action against a judge should be reported to the Attorney General.

19.6 Conclusion

We believe that the current disciplinary process should be replaced. The new disciplinary procedure which we propose will bring Nova Scotia significantly closer to the ultimate objective of judicial discipline: the achievement and maintenance of public confidence in the judiciary while safeguarding the independence of the judges from arbitrary interference.

20. MARSHALL RECOMMENDATIONS

20.1 Direction to the Task Force

Clause 1 (b) of the Task Force's mandate requires us to consider matters referred to us by the Attorney General. By letter dated March 8, 1990, then Attorney General Thomas J. McInnis asked the Task Force "to consider recommendations 31 (b) and 33 (of the Royal Commission into the Donald Marshall Jr. Prosecution)....and include in its final report suggestions for the implementation of these Recommendations".

20.2.1 Marshall Commission - Recommendation 31 (b).

> *That the* Human Rights Act *be amended to specifically state that those parts of the justice system under provincial jurisdiction are included in Act's coverage.*

With the greatest respect for the Marshall Commission, the intent of this recommendation is not readily apparent. Section 21 of the *Human Rights Act* [135] states:

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[135] *RSNS 1989 c. 214*

> *21 - This Act binds Her Majesty in right of the Province and every servant and agent of Her Majesty.*

This section has been in the Act since 1969 and clearly means that, with the possible exception of judges, all the people who work in the justice system and all the parts of the justice system under provincial jurisdiction are covered by the Act.

Therefore, we can only assume that the Commissioners concluded that the *Human Rights Act* does not apply to judges and wanted it amended to extend its coverage to them or at least to provincially appointed judges.

20.2.2 What does the Commission mean by "Coverage"

There are two relevant aspects to the "coverage" by an Act: (1) the setting of standards; and (2) enforcement. An Act can establish a standard of behaviour but it may not, as a practical or legal matter, be enforceable. Part I of the *Human Rights Act* establishes standards by prohibiting certain types of discrimination in certain circumstances. Part II establishes the Human Rights Commission and Part III provides for the manner in which complaints under the Act shall be handled, including prosecutions.

Therefore, the Commission may have intended to invoke the Act's standards for judges but not its enforcement mechanisms. This is the best interpretation of their recommendation. We think the standards of the *Human Rights Act*, and more importantly, the highest standards of human rights and human dignity bind all our judges. The only question is how to enforce them.

20.2.3 Enforcement Generally

Judges are subject to both the standards and enforcement mechanisms of the *Human Rights Act* when they are acting in their private capacity. For example, a judge who is a landlord is subject to the Act in its entirety when he or she is leasing an apartment. The judge could be brought before a Human Rights Tribunal if there is a complaint that he or she refused to lease the apartment to a person on the basis of that person's race, for example. But should the enforcement mechanisms of the *Human Rights Act* apply to a judge in the performance of his or her judicial duties?

There are a number of problems with this. The first, and simplest to deal with, is that the *Human Rights Act* is laid out in a series of prohibitions against certain types of discrimination in certain circumstances. Broadly speaking these circumstances are services, access to facilities, occupation of commercial or residential property, sale of property, employment and membership in employees' organizations and associations. It could be argued that the justice system is none of these and therefore falls outside the Act. But a better view is that the justice system is a "service" within the meaning of the *Human Rights Act*. It would be unthinkable that a clerk of the court could refuse to file a statement of claim because the plaintiff was black or a man or over 65. We think the *Human Rights Act* applies to the justice system and is enforceable against court personnel.

It is obviously undesirable that a judge would refuse to hear a case or decide a case on the basis of sex, race, creed or any other such factor. The question at hand however is what happens if a judge does such a thing.

20.2.4 Judicial Independence and Enforcement

The judge sitting in court is not above the law. The judge must interpret and apply the law. But in order to facilitate this, by long tradition and by statute, judges are independent of the executive branch of government when acting judicially. In Beauregard v. Canada[136] Brian Dickson, Chief Justice of Canada (as he then was), explained the reasons for judicial independence:

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[136] *[1986] 2 SCR 56.*

> *"the rationale for ..... judicial independence is recognition that the Courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it - rule of law, fundamental justice, equity, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute - resolution in individual cases. It is also the life blood of constitutionalism in democratic societies." (P. 70).*

In Valente v. the Queen[137] a leading case on judicial independence, Mr. Justice LeDain identified three of the "essential conditions" for judicial impartiality:

(a) security of tenure;
(b) financial security;
(c) institutional independence regarding matters affecting adjudication.

It is essential that judges make decisions on the basis of law, free from hope of gain or fear of loss. Judges, in short, must be free to make unpopular decisions. This ideal is not always met but, as a society, we strive to achieve it. For example, judges enjoy prestige, good salaries and benefits, and unparalleled job security. In Nova Scotia, provincially appointed judges' salaries are determined annually by independent arbitrators, not by the government. Judges can only be reprimanded or fired on the recommendation of the Judicial Council composed of judges and lawyers. At the same time, as individuals, judges give up a great deal to secure their independence, including the right to vote (though this is changing), the right to speak out on political issues, informal social contact, a degree of privacy and, in many cases, a substantial income.

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[137] *[1985] 2 SCR 673.*

A special, separate discipline process is required because judges frequently adjudicate disputes between the government and private citizens. If governments or government agencies could fire or fine them or capriciously control their salary, the citizen might have cause to wonder if the judge was completely objective: "Is he thinking about my case or his pension?", he or she might well ask.

Making any judge answerable to a tribunal appointed under the *Human Rights Act* would be inconsistent with the principle of judicial independence because the tribunal is an emanation of the executive branch of government. While it is essential that judges observe the standards set by the *Human Rights Act*, the cost to their independence of bringing them under its enforcement provisions is too great, especially when the judicial discipline process can achieve results that are the same or better without the destructive impact. Many of the very people who fight for human rights depend most on the independence of the courts - that is the freedom of judges to make decisions that may not please the government of the day or the majority of people.

We do not think it desirable that the enforcement provisions of the *Human Rights Act* extend to judicial actions.

It is not clear whether it would even be possible for the Legislature to bring judges under the enforcement provisions of the *Human Rights Act*.

20.2.5 Federal Judges

It will be recalled that the Marshall Commission itself sought to compel the five justices of the Appeal Division of the Supreme Court of Nova Scotia to appear and testify. The Supreme Court of Canada[138] determined that the Marshall Commission's power to compel witnesses in the *Public Inquiries Act*[139] did not extend to Supreme Court judges because of the doctrine of judicial independence.

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[138] *MacKeigan v Hickman [1989] 2 SCR 796.*

[139] *R.S.N.S. 1989 C. 372 S.4*

Admittedly, MacKeigan v. Hickman concerns only federally appointed judges and, in law, the position of federal judges may be different from that of provincially appointed judges as regards independence of the Provincial Government, though it is submitted that the principles that protect the independence of federally appointed judges should be equally applicable to provincially appointed judges.

20.3 Conclusion

Judges must conform to the highest standards of conduct. As we have seen in our discussion and recommendations concerning the Judicial Council of Nova Scotia, a great deal of care and attention must be paid to the manner in which judges' behaviour is reviewed.

The *Human Rights Act* is significant, not simply by reason of its legal status, but because it expresses some of the most fundamental standards of modern society. Therefore it is critical that judicial actions comply with, not only the letter of the *Human Rights Act*, but also its spirit. We think this can be achieved without impairing judicial independence. Judges, acting judicially, can be held to the standards of the *Human Rights Act* (and higher human rights standards) by judicial councils.

Therefore we conclude that the *Human Rights Act* should not be amended in the manner suggested by the Marshall Commission for the following reasons.

(1) The *Human Rights Act* already applies to the staff of the courts of Nova Scotia.

(2) The enforcement provisions of the *Human Rights Act* should not apply to judges when acting judicially because judicial conduct should not be reviewable by the executive branch of government or any emanation of the executive branch such as a Human Rights tribunal.

(3) There's considerable doubt, to say the least, as to the constitutional authority of the Legislature to bring federally appointed judges under the enforcement provisions of the *Human Rights Act* in any event.

(4) Provincially appointed judges should be as independent of the executive branch of government as federally appointed judges, therefore, even if the Legislature has the constitutional authority to bring provincially appointed judges under the enforcement provisions of the *Human Rights Act* (and there must be some doubt about this too), it should not.

(5) Both the federal and provincial judicial councils, as currently constituted, can, in our view, review judicial conduct as regards standards set forth in the *Human Rights Act* and take disciplinary action as required.

(6) If the disciplinary procedures provided in judicial council legislation are not sufficient, the appropriate legislative action is to amend the judicial council powers, not the *Human Rights Act*.

Recommendation 94

Judges should not be subject to the enforcement provision of the *Human Rights Act* when acting judicially. Conformity to the standards of the Act at all times is essential and judges should be subject to the discipline procedures generally applicable to judges for any infringement of those standards when acting judicially.

20.4 Marshall Commission Recommendation 33

> *"That the Chief Justices and Chief Judge of each court in Nova Scotia exercise leadership within his or her area of responsibility to ensure fair treatment of visible minorities in the criminal justice system."*

This recommendation can only be understood in the context of the entire report. It might be taken as suggesting that judges must be ordered by the Chief Justices and Chief Judges to treat people fairly. But the Marshall Commission found systemic discrimination, not overt racism in the justice system. The Commission stated:

> *None of this (earlier comments by the Commission on adverse effects felt by Blacks and Natives) is to suggest that this is the result of any evil intention to discriminate by those in the criminal justice system... Systemic discrimination is what happens when a specific act, policy or structural factor - intended or unintended - results in adverse effects for members of certain specific groups.*
>
> *Although much of the discrimination that occurs in the criminal justice system is of an unintended sort, it is no less insidious and its impact no less devastating because of that.*"[140]

The Commission makes the case for leadership in judicial education and we were pleased to find programs of sensitization for judges on racism and sexism are underway on the initiative of the judges themselves. For example, in June, 1990 all the judges of Nova Scotia attended a three day educational seminar in Halifax at the invitation of Chief Justice Lorne

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[140] *The Report of the Royal Commission on the Donald Marshall Jr. Prosecution, Volume 1, page 151.*

Clarke, Chief Justice of Nova Scotia. Topics included: possible new approaches to sentencing of visible minorities; racial and cultural diversity; gender equality; and the historical, social and cultural diversity among Canada's aboriginal peoples.

The seminar is notable for one other reason as well. It is the first time both federally and provincially appointed judges attended the same seminar. This is a measure of the importance all judges attach to the topics and also a sign of a determination to break down the old hierarchical notions that separated judges. We are told that a follow-up seminar is in the early planning stages but, as is often the case, funding is a difficulty.

We endorse Recommendation 33 of the Marshall Commission. There is a need for today's judges to be sensitive to social conditions, such as poverty, family violence and long term unemployment as well as to the concerns of women and visible minorities. Clearly it is the responsibility of the Chief Justices and Chief Judges to show leadership whether it be through educational programs, the discipline process, or judicial policy making. We find examples of this leadership and an eagerness to better understand social concerns among our judges. The decision as to the most effective means of achieving the goal of fair treatment of women and visible minorities in the justice system, with regard to the judiciary at least, is best left with the Chief Justices and Chief Judges with the assurance that they will deal constructively with it.

21. CASEFLOW MANAGEMENT

21.1 Introduction

Contemporary Canadian courts and court systems are complex organizations performing a wide variety of functions and requiring a broad range of staff services. They play an unusual, important and sensitive role in society. It is important, therefore, that they be properly structured, but it is just as important that they be properly managed.

21.2 Who Should do the Managing and How?

21.2.1 Traditional Views

If we accept the obvious, that courts should be effectively managed, we need to address other relevant questions like: Who should do the managing and how should it be done? The traditional view taken by both the bench and the bar has been that clients pick their lawyers and the progress of law suits should be left to the judgment (and convenience) of the chosen lawyer. Counsel are usually in the best position to know what should be done to present their cases most effectively. Judges are not usually in a position to decide what preparation is necessary, what evidence is required or what witnesses should be called. The judge takes no part in the management of the case. He or she shows up to hear the case and if counsel is not ready, the case does not go forward. Judges do not have a role to play until the pleadings are closed and any delay up to this point is the responsibility of the lawyer. The judge should intervene in cases to the least extent possible. Judicial intervention should be limited to the processing of a case through the court from the time a trial date is allocated. At this point in time, both judge and counsel share responsibility.

21.2.2 Emerging View

However, this long established view is giving way to a recognition that, once a law suit is filed in the courts, there is an overriding public interest in its prompt and just disposition. Once a case is set on the trial list, it is argued, its rate of progress affects all other disputes waiting to be resolved. During this period, therefore, counsel must give up some of their traditional autonomy over management of the case and share that responsibility with the court in the interests of the most expeditious processing of all litigation.[141] In return for loss of control over certain aspects of the litigation process, lawyers and litigants are given certainty that their case will proceed in accordance with generally accepted time guidelines. This position has recently been adopted by the Joint Committee on Court Reform in Ontario, which recently declared:

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[141] *B. C. Report, Access to Justice, The Report of the Justice Reform Committee, 1988, at p. 108.*

> *"We believe the delays and their costs in our current system create anxiety and unpredictability in the lives of litigants. This brings our system of justice into disrepute. The public has a right to expect that the court will play a more active role in supervising the flow of cases, which will alleviate many of these problems."* [142]

21.3 What is Caseflow Management?

A primary task of courts is to determine matters that come before them and to make these determinations justly, promptly and economically. This being the case, the central focus of court administration should be the effective management of the flow of cases through the courts. This function, called caseflow management, has been defined as the supervision or management of the time and events involved in the management of a case through the court system from point of initiation to point of disposition.[143]

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[142] *Court Reform Update, November, 1989 at p. 1.*

[143] *M. Solomon, Caseflow Management in the Trial Court (ABA) 1973, referred to in Millar & Baar, Judicial Administration in Canada, c. 8, Caseflow Management (1981).*

Caseflow management involves two essential elements: (a) the setting of a timetable for the stages of a law suit; and (b) judicial supervision of the progress of a case through the timetable. The primary goal is to eliminate present delays between stages in a proceeding. Reducing delays reduces costs to the litigant since files are kept current and counsel avoid duplication in preparation. Supervision by a judge familiar with the case should also reduce the cost of pre-trial procedures.

The most recent publication of the American National Centre for State Courts concludes that courts employing case management techniques in a dedicated way can reduce delay. This conclusion was based upon information collected from thousands of cases in 26 cities over a period of 12 years.[144]

21.4 Caseflow Management or Case Management?

The underlying premise for caseflow management is that the court has a genuine interest in the control of the flow of cases coming before it.

Caseflow management is a concept that has been applied in the United States for 20 years and seems to have been an initiative taken by some

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[144] *John Goerdt, Examining Court Delay, The Pace of Litigation in 26 Urban Trial Courts, 1987 (Williamsburg, Virginia, National Centre for State Courts, 1989).*

American judges in response to perceived defects in American civil procedure rules. A lack of either incentives or sanctions that would influence the way lawyers conducted litigation led to some members of the judiciary departing from their traditional impassive and objective stance to adopt a more managerial approach. These judges appear to agree that the system does not work, that something must be done to make it work and the only effective solution is ad hoc procedural activism by judges.

At this stage it is important to keep in mind a distinction drawn by Mr. Justice Zuber in his report between "Case Management" and "Caseflow Management". The first is a process whereby the judge is put in charge of a case and follows it through from beginning to end. In the second, the court becomes involved in the general picture of the movement of cases through the court but intervenes in individual cases only when delays have reached unacceptable levels or procedural complexities require untangling in order to permit the case to proceed.

Justice Zuber expressed the view that costs to the justice system and to the public of delays caused by slow moving cases was sufficient reason for the judiciary "as guardians of the public interest, to step in and manage the flow of cases through the system." (p. 185). Management of cases, in his view, could only be effectively carried out by the judiciary because only court orders could set a faster pace for the slow moving cases. He also suggested that while he supported caseflow management by the courts he did not think that case management was necessary or workable because of the need for a particular judge at all times to deal with motions. He also expressed concern that one judge might become too familiar with an individual case.

21.5 Ontario Initiatives

21.5.1 The Role of Bench and Bar

While the initial promotion of caseflow management techniques in the United States came from members of the judiciary, in Ontario it has come from the bar in the form of the Joint Committee on Court Reform. This body includes members from the Advocates Society; Canadian Bar Association, Ontario; County and District Law Presidents Association; County of York Law Association; Criminal Lawyers Association; and the Law Society of Upper Canada. There were also 55 members of the judiciary who contributed to the work of the Joint Committee as consultants.

Although the Committee was formed initially to develop a consensus relating to issues of court structure, they came to realize that a reorganization of the court structure alone could not rectify problems of excessive cost and delay. Instead, fundamental change in their approach to litigation was seen as required, with members of the bar concluding that case management would address the dual problems of cost and delay.[145] The Joint Committee appears to have adopted a combination of "caseflow management" and "case management" techniques, although these terms seem to be used interchangeably in Ontario.

21.5.2 Three Tracks

After careful study, the Joint Committee selected a case management system based upon that being used in the State of New Jersey. Pilot projects are to be established in three locales: Windsor, Sault Ste. Marie and Toronto. A three track system for civil cases will be established: a Fast Track, a Standard Track and a Complex Track. The plaintiff chooses the appropriate track at the institution of proceedings but there is some ability for both parties to change track if necessary, although a motion must be made to the case management judge to do so.

(1.) **The Fast Track:** handles simple cases with a single issue. Discoveries may be limited depending upon the pilot project site. A strict timetable is imposed which results in cases being heard within six months of the case being instituted. The time limits are automatic and non-discretionary.

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[145] *Court Reform Update, November, 1989, p. 2.*

(2.) **The Standard Track:** handles cases involving more than one issue but with a limited number of parties. The majority of cases will fall into this category and they will be heard within one year to 18 months of institution of the action. The timetable established can be reasonably flexible to accommodate counsel and the needs of the parties. On this track, the judge is expected to take an active supervisory role.

(3.) **The Complex Track:** Only rare or unusual cases are put on this track by court order after they have been started on the standard track. The timetable for the complex track case is set in consultation with counsel and the case management judge. These cases involve multiple actions (or multiple parties) of significant complexity and diverse legal issues. It is expected that cases on the complex track will take up to three years to complete.

21.5.3 Family Law Cases

These cases will also be case managed in Ontario but according to a separate set of rules being developed by the family law bar, bench and administration. It is possible that family law cases will only require a two track system but will feature mandatory and early involvement of the case management judge.

21.6 British Columbia

The Justice Reform Committee in British Columbia proposed dividing litigation into three categories for purposes of case management. The categories suggested were:

(1.) **Long Trials**: cases that require more than 15 days of trial time. Generally complex litigation involving multiple parties. Such trials can last many months and for such trials a trial date should be available within 12 to 18 months from the date it is set for trial.

(2.) **Medium Trials**: cases that require from 6 to 15 days of trial. They usually involve fewer parties and fewer major issues than the long trials. A trial date should be available for these cases within 9 to 12 months.

(3.) **Short Trials**: the majority of cases should require no more than 5 days of trial. For these cases a trial should be available within 9 months of setting down for trial.

The general categories in both Ontario and British Columbia are the same although details differ and the expectations as to what constitutes a reasonable time for completion also differ.

21.7 Key Principles of Caseflow Management

The American Bar Association has listed the key principles of caseflow management, all of which are premised on the notion of substantial judicial supervision, as follows:

(1) Acceptance by the judiciary of individual and collective responsibility for court control and the active management of the flow of all cases from filing to disposition.

(2) The institution by the court of detailed consultations on caseflow management with all the relevant interested parties.

(3) Establishment by the judiciary of appropriate standards and procedures to govern caseflow.

(4) A restrictive judicial policy of adjournments.

(5) The centralization of judicial responsibility for caseflow management.

(6) The development, by the judiciary, in consultation with others in the system, of appropriate time standards and criteria for system performance.

(7) The development of appropriate criteria for monitoring and measurement of caseflow management performance.

(8) The need for periodic modifications to the system in order to meet changing conditions.

(9) Monitoring of cases from filing to termination.

(10) Steps to minimize conflicts in lawyers' case schedules.

(11) Coordination of the whole caseflow process by an appropriate court administrator.[146]

In addition to these principles, other points have to be borne in mind:

(1) Case management must be consistent with the demands of justice.

(2) Caseflow management does not control the intake of cases. Caseflow management can only affect the rate of progression through the system once the case is in the system.

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[146] *M. Solomon, Caseflow Management in the Trial Court (ABA) 1973.*

(3) Community expectations determine what is an acceptable rate of progression through the system or to put in another way, what is an unacceptable period of delay.

(4) Adding more judges will not necessarily solve the problem of delay if good management is lacking.

(5) The judiciary must have accurate, hard information about the operation of the system (i.e. what is happening in the system?).

(6) Computers are valuable if a detailed game plan has been developed so that you know what it is that you want to compute, why you want to compute it and what you want to do with the information when you get it. Computerized information can assist greatly in carrying out a detailed plan and strategy but a computer is not an alternative to a plan.

(7) Although the judiciary must take the initiative and play a central role in caseflow management, no one group can control in an authoritative way the whole process. The close cooperation of the bench, bar, prosecutors and court officials is required.

21.8 Concerns

There are some concerns with active judicial case management. These are expressed by the British Columbia Justice Reform Committee:[147]

(1) Most pre-trial supervision is of a private nature. Pre-trial conferences are often conducted in a judge's chambers in private and off the record. This may reduce the litigants' safeguards against abuse of judicial authority.

(2) In attempting to resolve discovery disputes, judges may unwittingly assume the role of mediator or negotiator.

(3) Supervision of discovery can become an avenue for judicial control over all phases of the litigation.

These are clearly concerns worthy of serious consideration as is the question whether judicial management does in fact save time and expense. On this latter point, however, the National Centre for State Courts concludes that lack of pre-trial management leads to longer trials and early judicial control is the best predictor of fast case processing.

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[147] *(p. 107 - 108).*

21.9 The Present Situation in Nova Scotia Courts

21.9.1 County Court

In District #1 the first available trial date for a criminal or civil case as of January, 1990 was 5 months.[148] Mechanics lien cases were being set down 8 months in the future. From the time a civil case is received by the court until its final disposition takes 6 months. Criminal cases take 4 months to complete and mechanics liens 9 to 12 months.

There is no monitoring or managing of individual cases at the present time. Pre-trial conferences are used on all civil and mechanics lien cases but an attempt is being made to hold pre-trial conferences at an earlier date before trial than is now the practice.

21.9.2 Supreme Court

As of January, 1990, the first available trial date for a one-day civil case was 5 months, and a two-day civil case, 8 months ahead. A divorce could be set down in three months. At the end of 1988 the delay in Halifax was 12 months for a one-day trial. As of March 30, 1990, however, delay had climbed above 7 months due to some extent to the fact that one judge was ill and unable to hear cases.

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[148] *At the end of 1988 the time was 7 months. Statistics provided by G. G. Pohlkamp, Coordinator of Supreme and County Courts, Report of the Coordinator, January to June, 1990.*

From the date a Notice of Trial is received to final disposition takes about 6 months for civil cases and 4 months for divorces. Complex chambers matters take 2 months.

Pre-trial conferences are always used in civil cases but their effectiveness seems to depend to a great extent upon the ability and approach of the pre-trial judge.

The majority of civil cases are heard in Halifax. For example, in 1989, 67% of the civil cases were tried in Halifax and 33% on circuit.

21.9.3 Management Initiatives

The Supreme Court has taken some steps to minimize down time, including the following:

(a) using settlement conferences;

(b) tightening up the rules for filing Notice of Trial;

(c) applying a stricter adjournment policy;

(d) case management conferences for longer trials;

(e) earlier pre-trial conferences as needed.

The Chief Justice of the Trial Division urges additional steps, including:

(a) scheduling a decision week so that other court time is fully utilized;

(b) overbooking courtrooms;

(c) ensuring there are adequate judges in the system to cover scheduled assignments.

It is clear that an attempt has been made at the Supreme Court level, and to a lesser extent at the County Court level, to reduce delay and control the flow of cases. However, there has been no attempt to impose case management of individual cases from the date of their filing. Rather, control, such as it is, seems to be instituted once Notice of Trial readiness is received. Lawyers retain full control over all matters prior to the point of trial readiness and also retain the discretion to decide when a matter should be certified for trial. Lack of information about pending cases makes it difficult for the court to accurately schedule courtrooms and judges. It also makes it difficult for court administrators to calculate the total delay time for the client.

21.10 Conclusions

One of the trends mentioned by judges, lawyers and court administrators is the tendency to longer trials. As a reflection of this, the Chief Justice of the Trial Division has instituted a form of case management for these kinds of cases. The American experience shows that pre-trial management shortens trials. This experience has influenced courts in Australia and the U.K. It is reflected in the observations of Mr. Justice Woolf to the American Bar Association meeting in London, 1985 to the effect that, "when lawyers are left to determine the timing of a trial, the moment of truth may be unnecessarily delayed."[149] Justice Woolf declared that the passive role of the English court was no longer acceptable. In a similar vein, the English Civil Justice Review Committee concluded that "...control of the time taken in the conduct of proceedings in civil court should now be accepted as a function proper to that court acting where appropriate of its own motion...".[150]

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[149] *As reported by Plotnikoff, The Quiet Revolution, English Civil Court Reform and the Introduction of Case Management, The Justice System, Vol. 13 at 203 (1988-89).*

[150] *Quoted in Plotnikoff, Ibid at p. 209.*

If we are to make our dispute resolution process as effective as possible, we need to do something more than merely restructure the court system. We need to be able to track cases from an early stage in order to get a true picture of any delay. This will involve new procedures and the use of technology.

Chief Justice Glube has taken some very useful steps towards effective caseflow management, but her initiatives need to be carried even further. However, whether caseflow management or case management techniques should be applied to all aspects of the civil justice system or limited to longer trials, and whether special caseflow management procedures are required for family law cases, are questions best left to be decided by the judiciary, the Department of Attorney General and the bar, so long as they are cognizant of the wider community interest in timely dispute resolution at reasonable public expense. Any developments in this direction will require the close cooperation of bench, bar and court administrators. The process is such that it cannot be imposed and has to be accepted as desirable by the parties involved in order to be effective.

Recommendation 95

Caseflow management techniques should be developed and applied, where appropriate, to the dispute resolution process generally.

Recommendation 96

The judiciary should take the lead in a cooperative effort with the bar, prosecutors and court administrators to establish acceptable criteria for caseflow management.

Recommendation 97

Proposals to overbook courtrooms in order to better utilize judicial time should be implemented.

Recommendation 98

Information gathering procedures should be instituted and the necessary technology required to provide the information relevant to delay should be provided.

22. MANAGEMENT COMMITTEES

22.1 Managing the Court System

Managing cases is not the same as managing the court system. Certainly the current court structure is not conducive to good case flow management but it's not the only impediment.

22.1.1 Efficiency

To begin with, management is not the first priority of the justice system. Generally speaking, we believe that an efficiently managed case has a better chance of yielding a just result than an inefficiently managed case. An efficient court system will, in the main, be more just than an inefficient one because resources will be brought to bear on a problem more quickly. However, when efficiency collides with justice in any particular case, justice must prevail. So, efficiency is a means to an end, not an end in itself.

22.1.2 Control

One of the best examples of this is the court system. There is no one in charge of the whole thing. If there was, it would be more "cost effective" in the sense that more cases would be processed more quickly but it wouldn't be as just. As former Ontario Attorney General Ian Scott, Q. C. explained:

> *"....(T)he most significant impediment to management of case flow is that for perfectly sensible reasons enshrined in our written and unwritten constitution no one player or group of players controls the judicial process. Management of a court system in Canada and particularly management of case flow is a difficult and complex undertaking precisely because it requires the co-operation of administrators, judges, Crown attorneys and the private bar. We might even add legal aid and the police to the list. In our system each has an independent role to play which can not be ceded to the others. For example, some elements of administrative decision making are reserved to the judges alone in order to assure the maintenance of their constitutionally entrenched independence from the executive or legislative branches. On the other hand, only popularly elected assemblies can provide the necessary resources and assign them to the system. And finally Crown attorneys and the bar each have an independent role upon which neither the judges nor the administration can encroach.....*

> *.... the most important rule we can learn from other places is that management of caseloads and caseflow cannot be achieved by anyone giving orders. As I have already said cases are managed and conducted by administrators, judges, crowns and the private bar, each of whom have an independent role and each of whom will not willingly and in some cases are prohibited by the Constitution or convention from submitting to orders. Judges cannot be told to spend only three hours in a case if they think it should take five. Crowns cannot be told to withdraw a prosecution if, in their independent discretion, they think it appropriate to proceed. Defence counsel cannot be successfully invited to plead guilty early to impaired driving cases when it is possible for them to obtain a twelve month adjournment for their clients. It thus follows that in every jurisdiction where successful management of case-loads and case flow has been achieved, cooperation among the principal players as equals has been the essential operative principle and guiding rule.*"[151]

In short, all the players are legally independent but practically interdependent. They are partners who can have no managing partner. Co-operation is the only choice.

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[151] *The Honourable Ian Scott, Court Management and Delay Reduction, The Law Society Gazette, p. 293 (Need Citation of Article) at page 294 and 296.*

22.2 Cooperative Management

Ontario has decided to establish committees composed of each of these partners, plus lay representatives, in each of its eight judicial regions. In Mr. Scott's view, some degree of improvement is assured:

> *"...... there is no community in the western world which undertook co-operative caseflow management that did not substantially speed up its trial process and improve the efficiency of its caseflow. While absolute success was not achieved of course, in every case, there is simply no recorded incidence of failure if proper techniques of case management were applied."* [152]

Recommendation 99

The judiciary, the Nova Scotia Barristers' Society, the Director of Public Prosecutions and the Departments of Attorney General and Community Services should co-operate to establish court management advisory committees similar to Ontario's in each of Nova Scotia's judicial regions.

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[152] *Ibid., p. 295.*

Recommendation 100

The first goals of the court management advisory committees should be to cooperatively:

(a) set caseflow management goals;

(b) define precise strategies to achieve those goals;

(c) facilitate the employment of those strategies; and

(d) monitor the employment of those strategies.

23. THE USE OF TECHNOLOGY IN COURT ADMINISTRATION

23.1 Introduction

23.1.1 Automation

An important aspect of court efficiency and the overall effective functioning of the judicial system is the proper use of technology. There are many mundane functions essential to the day-to-day operation of a court that lend themselves to automation. Matters such as accounting procedures, personnel records, preparation of daily court lists (dockets), recording of adjournments, guilty pleas, acquittals and judgments, could all be most effectively handled by computerized processes. These are just the basic functions that could benefit from greater use of technology but there are also other matters of court procedure and administration that could equally benefit.

23.1.2 Efficiency without Injustice

It is possible to use technology to promote the highest quality of justice by reducing costs, delays and inconvenience while improving accessibility. Increased productivity and responsiveness can be achieved without a loss of traditional values and concepts which form the foundation of the courts' search for a just resolution of disputes, providing careful decisions are made.

23.1.3 Requirement for New Technology

Courts are clearly in the information business, but the judicial system has fallen behind private organizations and other government agencies in their use of automated systems. Whether this is due to lack of money or interest or both is difficult to say but, if courts are to operate as effectively and efficiently as is and will be required then they must employ the same information technologies that are common in business and government.

Caseflow management requires control and monitoring of systems. Information is required in the form of status reports, aging lists, case inventories and lists of cases disposed of. Status reports can be generated showing numbers of pending cases by classification. The aging list could classify cases from oldest to newest with a flagging process used for those that have crossed certain time limits. Case inventories can be developed giving the total number of cases by major category. The number of cases disposed of within a certain period of time and the various categories can be compared with the number of new cases filed in the same period. This use of computers would allow for proper caseflow management and it would ensure that cases are heard within a reasonable period of time, given the particular type of case and judicial personnel available. This type of monitoring focuses on exceptions, identifying areas which are not under control and flagging the source of the problem.

Computers can also be used to schedule lawyers, judges and courtrooms, to record activity in all cases and report how much time has elapsed since a case was filed and the last action taken, to schedule timetables for discovery, submit instructions and pre-trial motions, along with a trial date and other steps in the litigation process. They can also be used to schedule arraignments.

23.2 Present Automation in Nova Scotia Courts

23.2.1 M.I.S.

The Management Information Systems (M.I.S.) Section of the Department of Attorney General acts as an agent on behalf of both the Department of

Attorney General and the Department of Solicitor General for the development and support of management information systems. M.I.S. is the service bureau for both departments and tries to tailor systems and develop initiatives with departmental and government-wide initiatives and priorities in mind.

23.2.2 Justice Oriented Information System (JOIS)

The Departments of Attorney General, Solicitor General and Community Services are developing integrated justice systems for the Province of Nova Scotia. These systems are cumulatively known as the Justice Oriented Information System (JOIS). JOIS has been designed and developed with a provincial perspective in mind.

The first step towards this goal was the development of the Provincial Court Information System (PCIS), a Provincial Court adult case tracking system.

The Departments of Attorney General, Solicitor General and Community Services, with financial assistance from the federal Department of Justice, initiated a joint project to analyse, design and develop an integrated system which will help satisfy the legislative and administrative requirements of the *Young Offenders Act*. In addition, the system will provide management information, operational features, and meet national statistical reporting requirements.

Presently, JOIS has been developed to track both adults and young offenders through the many levels of court (Provincial, County, Supreme and Family) and custodial institutions. The long term goals for JOIS are to include components for probation tracking, Alternative Measures, Prosecutors, Sheriffs' Division (prisoner transportation and court security) and police. A basic principle behind JOIS is to capture information at its source and disseminate that information to others that require the same information.

To date, the JOIS court component has been implemented, via the Department of Government Services network, in sixteen (16) Provincial Court locations across the province.

The JOIS courts component was developed using the operational PCIS system as a foundation. Extensive functional and technical changes have taken place to the court component to allow both adult and young offenders charged with an offence to be processed. The system includes complete ability to track court cases from generation through to completion. Extensive details of an individual's personal demographic, charges, cases, hearings and conclusions are tracked. An extensive financial component has also been developed to administer all monies received through fine sentences. There also exists the ability to enforce the dispositions of fine sentences as well as offer alternatives to fine payments known as "Fines Collection" and "Fine Options" respectively. All these features of the court component are supported by extensive reporting and inquiry capabilities.

A JOIS custody component has also been developed and tracks offenders (adults and youths) from the time of sentencing through to the release from a correctional institution. This component has been designed and developed as an operational institution-based computer system as opposed to an administrative statistical system. This includes the ability to admit an individual to a correctional facility, assign an individual to a unit (cell), transfer an individual to other units and institutions, and release an individual from custody. Other custodial tracking functions include "incident" and "temporary absence" tracking. An extensive reporting and inquiry component for head office of the Department of Solicitor General, correctional institutions and federal departments also exists.

The JOIS custody component is operational in the head office of the Department of Solicitor General. The system is being used to track young offender admissions and releases from correctional facilities. In fiscal year 1990/91, the JOIS custody component will be implemented in three correctional facilities which include the Nova Scotia Youth Centre (NSYC), Kings Correctional Centre and the Halifax Correctional Centre.

The Department of Transportation, Registry of Motor Vehicles, Department of Attorney General and Department of Solicitor General, along with the New Glasgow Police Department, have been participating in a pilot project in which information contained in the on-line Registry of Motor Vehicles (RMV) system as well as the JOIS court component has been made available to the police agency. The New Glasgow Police Department, along with four other police agencies which N.G.P.D. is hosting, has found this information extremely beneficial for general policing as well as investigative operations.

It is anticipated that JOIS will be further extended in its capabilities so that it will be able to track the admission of an offender to community corrections programs, any transfer or release from a probation term or any related reports and inquiries. Planned development will also permit tracking of individuals in relation to custody, Alternative Measures and offender transportation.

23.2.3 Workstations

Besides developing the JOIS system, M.I.S. has provided each Provincial Court with a multifunctional workstation which, in addition to providing access to JOIS, provides office automation capabilities such as word processing, spread sheets and electronic mail. Most of the Provincial Courts are currently using the word processing feature of the multifunctional workstation for transcript production.

23.3 Supreme and County Courts

Clearly, significant steps have been taken and progress achieved in the technological upgrading of information collection processes in relation to the criminal justice system. The same kind of technological developments need to take place in relation to the civil justice system. What is now operative within the Provincial Court needs to be expanded and extended to the Supreme and County Courts (if the latter is still in existence). We understand that M.I.S. have submitted a request to proceed with a study of the Supreme and County Court requirements for civil proceedings, as well as an investigation into the paper flow at the Prothonotary's Office. We strongly support these requests.

23.4 Registry of Deeds

The existing grantee-grantor indexing system in the Registry of Deeds has been computerized to the extent that computer based indices for each of the twenty-one provincial registries are now being generated.

Prior to the existence of this system, deeds were manually indexed in the order in which they were registered. A formal consolidation and generation of proper alphabetical indices was not provided until year-end. This frequently meant that searches were error-prone as well as time-consuming.

Each registry keys data locally, which is then sent to the Department of Government Services central IBM mainframe (Halifax). The data is then consolidated with existing index information. An alphabetized, up-to-date index can then be printed for that registry on a monthly basis.

23.5 Potential Improvements

23.5.1 Electronic Data

Much court time is taken up with document generation, processing and storage. We should review the documents now being filed with a view to the elimination of unnecessary forms and the improvement of those that must be used. Electronic filing of documents and the creation of a computerized electronic data base that could be searched by remote terminals would free up badly needed physical space and make public documents more accessible.

Mr. Justice Richard has described the process established in the Province of Quebec as follows:

> "*The Province of Quebec has set up computerized docket control, court scheduling, document production and file retrieval. Documents are entered into the computer as they are filed in the clerk's office. A complete history of the pleadings and the progress of the matter is recorded. Notices of hearings and trials are generated automatically by the computer. A lawyer can get a schedule from the court showing the docket of cases in which he is involved and the status of each of these cases. The system can be monitored from the lawyer's office if the appropriate equipment is in place. It can also be monitored from the lobby of the court house where a bank of computer terminals are installed. In Quebec, a party to the action may view his file from a monitor and determine precisely the current status of the matter. This has caused some embarrassment to some lawyers who have been somewhat over zealous in relating to their clients the tremendous efforts and the myriad applications which have been made in bringing the litigation to a successful conclusion.*"[153]

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[153] *Court Technology - A Judicial Overview in a Compendium of Computer Technology for Judges, a paper prepared for the Judges' Computer Advisory Committee, September, 1988, p. 5.*

Mr. Justice Richard has also described the process developed in California to speed the flow of documentation and improved tracking and data retrieval. In this jurisdiction, they use a system of bar coding which is a scanning technology. Apparently it has been found to be at least twice as fast as key entry with a very low error rate. Bar coding can be used to encode the nature of the action, location of file, status of pleadings, motions and applications, recording of exhibits and virtually all matters pertaining to the progress of the file through to final disposition.

As government data bases are developed in relation to company documents, motor vehicles, land titles and court judgments generally, public access for a fee could be allowed. It would thus improve access and generate revenue as well.

23.5.2 Court Judgments

At the present time, judgments of the Supreme and County Courts in Nova Scotia are typed and filed with the court registry. They are provided to commercial publishers who publish them for profit. Technology now available allows court judgments to be entered in machine readable form which creates an electronic data base that can be searched electronically. If judgments of the Supreme Court, the County Courts and the Provincial and Family Courts were recorded in machine readable form, they could be kept on line and available as soon as written. They would be available to lawyers in Nova Scotia as well as members of the bench and public for immediate retrieval electronically. Any delay in getting them published would not be detrimental. Cases not selected for publication would also be readily available for consultation and use, thus avoiding a present problem of trying to stay up-to-date. It would seem reasonable, therefore, to plan for a situation where court judgments in the near future will be entered or transcribed electronically and maintained as part of a data base.

23.5.3 Facsimile Transmission

"Fax" machines are now used in many law offices to transmit letters, documents and pleadings. Earlier concern that the fax document would fade and become unreadable have been overcome with the development of machines that use regular bond paper rather than specially chemically treated paper. Fax documents are now accepted in some jurisdictions on the understanding that the original will be filed.

Most rules of court were drafted when facsimile transmission did not exist and should be amended to reflect this technological change. The Family Court has recently passed a rule relating to the filing of documents by facsimile transmission. Upon compliance with the provisions of the rule

(Rule 6.03), the filed facsimile has the same force and effect as the original.[154] We understand that the Judges of the Supreme Court (Trial Division) have proposed a rule that would allow the filing of documents by fax whereby the facsimile would be treated as the original document.[155] The proposal has been accepted in principle by the Department of the Attorney General and it is expected that plans will be drawn up for a pilot project to get under way in the next fiscal year. Acceptance of facsimile transmissions would seem to be a big step towards ultimate acceptance of electronic filing of documents.

23.5.4 Teleconferencing

Greater use of teleconferencing in relation to areas like Cape Breton and Yarmouth could save lawyers time and clients money. The Cape Breton Barristers' Society in their brief suggested among other things that many matters concerning appeals could be handled by pre-arranged conference call rather than court appearance. Matters such as hearing of chambers applications for directions, setting down, stay of proceedings, dismissal for noncompliance and perhaps for hearing of some appeals could be handled by teleconferencing:

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[154] *See Appendix 9.*

[155] *Civil Procedure Rule 4.A., made by the judges of the Supreme Court, has come into force since this chapter was written, allowing fax filing.*

> *"When a Cape Breton lawyer travels to Halifax for a chambers application or a one-half day hearing he or she must lose at least one full day from the office, sometimes more than one day and in addition must pay travel expenses and accommodation expenses which run approximately Five Hundred Dollars ($500.00) over and above the cost of the appearance and the lost billable time."* [156]

23.5.5 Video Teleconferencing

Although video teleconferencing technology has been around for some time, it is now available as a peripheral for personal computers. By installing a special monitor, it is possible to integrate this technology into the automated system. The monitor apparently serves a triple purpose: it functions as a computer, a video monitor and a document monitor. Justice Richard gives the following example:

> *"A judge wishes to hear a pre-trial motion or hear a pre-trial conference but the lawyers are thousands of miles away in another city. The judge can flick his computer monitor to video and speak to the lawyers who would be assembled in a similarly equipped facility in their city. All participants could see one another and documents could be displayed on the screen as required. Although this is a*

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[156] *Brief submitted to the Task Force, April, 1990, by the Cape Breton Barristers' Society, at p. 23.*

> *costly operation (costs increase with distance since it uses special long-distance communication lines), it must be weighed against the cost of travel and time lost. A rough guesstimate would be a saving of from 50% to 75%. This technology should be most appealing in countries having large geographical areas and which are somewhat sparsely populated."* [157]

It would seem that although the court should retain its ability to require the parties to appear in court, when no testimony is to be offered, video should be the preferred way to conduct hearings particularly and trials at a distance if necessary. Appellate proceedings and pre-trial motions, as well as arguments, could take place remotely using video conferences or teleconferences. Trial court hearings on arraignment, bond and appointment of counsel, pre-trial motions, post-trial motions and other matters not requiring witnesses to testify could be conducted from the judges' and lawyers' offices rather than at the court house. A video link could satisfy the defendant's rights to be present at hearings. Mr. Justice Zuber recommended exploration of closed-circuit by satellite TV and conference telephone links for first appearances in criminal and family court and for pre-trial conferences in all courts.

One example of the use of this technology can be found in Toronto where a form of video teleconferencing is being used for remands and bail applications. It has been described by Mr. Justice Richard in the following way:

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[157] *Compendium of Computer Technology for Judges - Court Technology - A Judicial Overview, at p. 9.*

> *"The Datapoint System is presently being used in Toronto for remands and bail applications. The accused can appear on the monitor at the jail and the judge and counsel are on monitor at the court. This has greatly cut transportation costs as well as the cost of court security and security in transit. The same system is used in various States of the Unites States of America to take pleas, enter verdicts, and give sentences. The specific criminal legislation in place in a given jurisdiction may influence the extent to which this technology may be used."* [158]

This is an imaginative use of technology. It should be seriously evaluated in light of the potential for significant cost reductions in relation to transportation and security.

23.5.6 Court Reporters and Transcripts

In some areas such as Cape Breton, a source of considerable delay and cost is found in the generation of a trial record and transcripts. In Nova Scotia, transcripts are provided quickly for all oral judgments given in the

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[158] *Ibid.*

County and Supreme Courts and are submitted to the judge. Transcripts are also automatically prepared for all preliminary inquiries. In Halifax County, the main court house has a central recording system covering all twelve courtrooms. A chief operator and an assistant monitor the equipment and control and distribute the tapes in accordance with established procedures. Court reporters therefore do not take shorthand notes of the evidence given, nor do they use stenotype machines. In all other areas of the Province, the recording of all matters before the court is by equipment which is placed and located within the courts and is not on a central system. Daily transcripts are generally prepared immediately following the hearing and original copies of transcripts are filed with the registry where the case originated. Copies are sent to Crown counsel and to defence counsel. All copies of appeal books are given to the party initiating the appeal.

Court reporters who record proceedings are full-time staff in the court reporting branch of either the Department of Attorney General or Community Services. They cover all cases in all courts except for Small Claims. Reporters are paid a salary for their court services and do not receive fees for the preparation of transcripts.

The administrative responsibilities of the reporters and the recorders include the following:

(a) maintenance of recording equipment and supplies;

(b) setting up reporting and recording systems in the courtrooms and monitoring the recording onto the tape during proceedings;

(c) maintaining a written log of participants and events during proceedings;

(d) monitoring of transcript requests to ensure accurate and timely transcription services, as directed by the chief clerk;

(e) inventorying and storing of notes and recorded tapes to ensure preservation for transcription and playback;

(f) preparation of invoices and billings;

(g) acting as clerks while on circuit as requested;

(h) providing secretarial services to the judiciary.

In order to reduce delays in some instances in providing transcripts of evidence for appeal purposes, the Attorney General's Department has considered the sale of a duplicate tape of the evidence. While this proposal has been considered, no decision has been made as far as we are aware, to actually do this. Reaction by the bar seems to be mixed to this proposal.

There now exist a number of technologies that should be seriously considered and evaluated as methods for reducing the time and cost involved in producing trial transcripts. One such technology is C.A.T. or Computer Assisted Technology. This process requires a skilled operator to enter key strokes in machine readable symbols. A computer instantly matches the symbols to characters or words previously stored in the computer memory and the matched word appears as part of the language text. In cases where the symbol cannot be matched, the computer will register the word untranslatable. This gap can then be corrected and inserted into the text. Prior to the trial, the operator will consult with counsel and obtain a list of names or technical terms which will then be entered into the computer dictionary. The incidents of "untranslatables" is consequently reduced. In its most advanced application, C.A.T. produces real time translation of a testimony of a witness. The testimony will appear on monitors in plain English seconds after the words are spoken.

It is suggested by those who are familiar with this technology that it can eliminate the problem of delay in the production of transcripts, cut their costs significantly and do away with the need for appeal books entirely. It can also ease the burden on the trial judge who must make a decision relying on notes made at the trial, as in the ordinary case where daily transcripts are not ordered. To be more precise, C.A.T. is said to offer the following advantages:

(a) it provides an instant auditing of testimony;

(b) it reduces the chance of error;

(c) it eliminates the need for time consuming read-backs and allows for indexing of testimony in long trials (judges can review references to a particular subject quickly without the need to rifle through many pages of transcripts);

(d) it provides the judge with more precise information when dealing with objections by counsel;

(e) it eliminates the need to print a verbatim hard copy of the evidence; only those parts necessary for proper disposition of the case need be printed.

In general, C.A.T. reduces paper costs, storage requirements and retrieval time while the accuracy of the final product is improved. There are, however, some significant disadvantages that have to be considered. First, at the present time, it requires three years to train a stenographer or judicial secretary to function efficiently as a C.A.T. operator. Second, it is a costly system to set up although it is said by its proponents to be cost effective.

In light of these significant drawbacks, it would seem prudent to thoroughly explore other sophisticated ways of capturing trial evidence and recording it. One method that has been used and already referred to involves the video-taping of trials. The video tape, in addition to providing an oral record of the testimony, also provides a visual record of its delivery. The effect of such transcripts upon present appeal court rules about witness demeanour would have to be considered as well as the various uses that might be made of the video tape by counsel, the court and others. We are not suggesting that there are not problems involved with such new techniques, but at least they ought to be explored as to their potential for future use in terms of cost reduction and time saved.

23.6 Conclusions

Greater use of available technology is imperative if we are to obtain the needed information about how the justice system currently functions. We need to have an accurate picture of present conditions and the ability to track and measure the impact of procedural or structural reforms. Full computerization of all court records is a necessary first step in a program that will move from data collection to data management and analysis and which will eventually culminate in the implementation of reform measures in court administration and the adjudicative process itself.

We also need to utilize technological developments where, by so doing, we can reduce costs, speed up the administration of justice process, and make the process more convenient for its users. All of this must be done, of course, without sacrificing the safeguards that are required to ensure that justice is done for the parties involved in the process.

Recommendation 101

The present M.I.S. (Management Information Systems) should be extended to provide for the collection and analysis of additional data and the proposed program for collecting civil case statistics be advanced in time.

Recommendation 102

The M.I.S. Section of the Department of Attorney General should consider the feasibility of the complete electronic filing system to replace the present paper filing system in the court registry. The objective would be

to create a computerized electronic data base so that each file could be searched by remote terminal. The potential cost savings to taxpayers and litigants from electronic filing and storage of court documents is significant but we recognize there are also technical and legal problems to be overcome.

Recommendation 103

A central judgment registry should be created to facilitate the enforcement of court judgments. There should also be remote access to such a data base.

Recommendation 104

A pilot project should be developed for the facsimile filing of documents. Such facsimile filing will increase access to court registries and reduce costs to litigants, particularly in the rural areas of the province.

Recommendation 105

The M.I.S. Section of the Department of Attorney General should consider the feasibility of expanding the current program of computerizing data bases such as the grantee/grantor index for real property to develop other data bases which could be accessed by the public and the bar.

Recommendation 106

Judicial decisions currently being typed in the ordinary way by secretaries should be typed in machine readable form so as to create a decision data base. These cases should be accessible to the judges and the bar and perhaps eventually to the public itself. Such access would be paid for and would thus generate revenue for the government.

Recommendation 107

The M.I.S. Section of the Department of the Attorney General should explore the use of technologically sophisticated methods of providing transcripts of trial evidence, including C.A.T.

Recommendation 108

To complement the proposed regional court administration and structure, a feasibility study should be made of the possibility of using closed-circuit or satellite television and conference telephone links for first appearances in criminal and Family Court and for pre-trial conferences in all courts as well as all procedural motions.

24. ALTERNATE DISPUTE RESOLUTION

24.1 Introduction

Effective dispute resolution is of vital importance to any society. Litigation – the resolution of disputes through our court system – is at the heart of the Canadian system of justice, but it has its drawbacks. It can be slow and the adversarial process is said to be unsuited to some kinds of disputes.

24.1.1 ADR: What it Means

There is growing interest in processes that might provide more effective dispute resolution. These ways of settling disputes are collectively referred to as Alternate Dispute Resolution, or ADR.

24.1.2 ADR: What it Includes

ADR can be:

(a) part of the court process (i.e., pre-trial settlement conferences, class actions, judicial case management and the use of expert fact finders such as referees);

(b) tied into the court process (i.e., mandatory mediation or arbitration);

(c) completely separate from the court process (i.e., neighbourhood justice centres, rent-a-judges, binding arbitration).

But it has been said that there are really only three types of ADR:

(a) negotiation;

(b) mediation;

(c) adjudication.

24.1.3 Negotiation

Whenever people exchange information for the purpose of changing another person's position or point of view, they are negotiating. Lawyers usually attempt to resolve disputes through negotiation. Approximately 90 percent of all claims commenced in court are settled without a trial.

Forcing people to think realistically about their chances is one of the hidden contributions of the court system. Unfortunately, this realism often sets in on the courthouse steps. This creates problems for the courts and contributes to public expense.

24.1.4 Mediation

Mediation uses a neutral third party to help the disputing parties reach agreement. The mediator has no decision-making power and, if a settlement occurs, it is the result of an agreement between the parties, not the imposition of the views of the mediator.

24.1.5 Adjudication

A trial before a judge is the most familiar adjudication but it is merely one example of the process where a neutral third party is given power either by the state or by the parties to make a binding decision.

24.1.6 Variations

Although these are the main types of ADR there are many variations and hybrids of each. There is a continuum from negotiations through mediation to adjudication. The distinguishing feature is the degree of control given the third party.

24.2 Specific Types of ADR

The Alberta Law Reform Institute recently published a report on dispute resolution[159] in which various methods of dispute resolution are described and their advantages and disadvantages enumerated. We found it a particularly useful catalogue and thought it worth summarizing so that it may receive greater exposure in Nova Scotia. The following discussion draws significantly upon the Alberta Report.

24.2.1 Mediation

Mediation is a process by which a neutral third party assists in resolution of a dispute. The mediator is a facilitator, not an adjudicator. The decision is reached by the parties. It is the least intrusive form of third party dispute resolution. If agreement results, it is enforceable as a contract or it may be annexed to the court system so that the agreement is enforceable.

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[159] *Dispute Resolution: A Directory of Methods, Projects and Resources, Research Paper #19, July, 1990.*

Because it is less confrontational than adjudication, mediation is less disruptive of long-term relationships. It is faster, cheaper and less formal than litigation.

However, it requires parity of a bargaining power if there are to be just results. If it fails and litigation results, it adds another step to the process. There are questions about the ability and qualifications of mediators and a danger that it will be seen as second class justice.

24.2.2 Neighbourhood Justice Centres

NJC's are designed to resolve minor, interpersonal disputes in the community through mediation. Participation is voluntary and generally involves disputes between neighbours, landlords and tenants, family members and minor criminal offences.

NJC's increase access to justice because they are prompt, informal and cheap. They increase citizen participation, and resolve disputes that might otherwise fester. The courts are allowed to attend to more serious cases.

NJC's have been criticized as increasing social control over disadvantaged groups and as a second class justice for people who cannot afford to use the court system.

24.2.3 Investigative Mediatory Hybrids

"Ombudspersons" investigate and attempt to mediate disputes between members of the public and the Government. They relieve the claimant of the onus and expense of pursuing a remedy. On the other hand, it is questionable whether taxpayers should pay to solve problems where the complainant is at fault. It makes it easy for complainants to bring disputes forward, possibly promoting complaints of little or no merit.

24.2.4 Private Arbitration

This form of adjudication is common in ongoing, contractual relationships. The parties select the arbitrator, the procedure and the question for decision.

Arbitration allows disputes to remain private. The parties, not the taxpayer, bear the costs of dispute resolution. It is more flexible, faster, less expensive, and less intimidating than litigation. It is generally less damaging to business relationships and, if experts are used as arbitrators, more efficient than litigation.

Arbitration can be more expensive and time consuming than litigation if it is merely a prelude to litigation. There are concerns about the qualifications of arbitrators.

24.2.5 Mini-Trial

This is a voluntary dispute resolution process that blends mediation and adjudication and may result in either a negotiated settlement or nonbinding arbitration. Lawyers for each party make summary presentations at the mini-trial. Witnesses, experts and key documents may be used. The mini-trial is without prejudice to any subsequent litigation. The presentations are made to high level representatives of each party - at least one level higher than those involved in the dispute.

The mini-trial provides the parties with more information upon which to negotiate. This makes settlement more likely. It has all the advantages of mediation and arbitration.

The mini-trial may be inappropriate where a case turns largely on legal issues.

24.2.6 Med/Arb

In this process the same person serves as both mediator and arbitrator. If mediation fails, the "arbitrator" imposes a decision.

It is felt that there is less posturing by the parties in the mediation process because of the risk of an imposed resolution. However, the adjudicative role of the arbitrator is compromised by mediation efforts.

24.2.7 Pre-Trial Conference as Settlement Promoter

Pre-trials can be "preparation oriented" or "settlement oriented". (We have both in Nova Scotia.) The settlement oriented pre-trial should increase the rate of settlement, benefiting the public in cost reduction and the parties in cost, time and stress reduction.

However, the presence of court-run settlement conferences may delay or discourage private attempts at settlement. The success of the pre-trial depends greatly on the skills of the judge.[160]

24.2.8 Voluntary, Nonbinding Arbitration

This is referred to as the BC mini-trial. It is an off-the-record procedure where counsel present a summary form of argument to a judge in the presence of their clients. The judge cannot hear the trial if it continues. Cost sanctions could be imposed if parties that use the mini-trial proceed to court without improving their position.

The mini-trial allows an objective appraisal by a judge, which should promote settlement but it could also be abused if it is treated as a "dress rehearsal" for trial without attempts at settlement. In such a case it simply adds expense and delay to the resolution of the dispute.

24.2.9 "Rent-A-Judge"

This approach is used in California and involves a reference procedure by which a court appoints a referee[161] to hear all or part of the case. The parties pay for the referee but the result is made a judgment of the court.

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[160] *See Chapter 21 of this Report: Caseflow Management.*

[161] *See Chapter 17 of this Report: Masters and Referees.*

This allows the use of experts and, because the parties choose the referee, he or she will have more credibility to the parties. The process is flexible, faster and cheaper than litigation even though the parties pay the referee's fees. It saves public expense as well.

It is confidential but may be unfair if only the wealthy can afford to use it. These "secret trials" can be said to be against public policy because the public cannot scrutinize this aspect of the administration of justice and creates no precedents. (Of course this is true of virtually all ADR to one degree or another).

24.2.10 Zuber Recommendations

The Ontario Courts Inquiry Report suggests a voluntary arbitration mechanism built into the court system.[162] If the parties agree, arbitration would proceed in place of court proceedings, on the record. The award would be a judgment of the court but the arbitrator's fees would be paid by the parties. Because it is on the record, the criticisms directed at the California model are not applicable.

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[162] *"Zuber Report" at pp. 216-217.*

24.2.11 Involuntary Nonbinding Procedures

In parts of the United States arbitration is required in certain cases (for example, all cases in which the amount claimed is below a specified figure or if both parties agree). The arbitrators collect a small fee from the State. It is intended to promote settlement and is nonbinding. It is speedy and relatively inexpensive for both the public and the parties so it is accessible to lower income people.

However, in Canada there may be problems with Section 96 of the Constitution Act. As with private arbitration, there are no precedents and this will tend to impair existing settlement procedures because there will be fewer cases to guide parties in their negotiations. This also undermines "the process of affirming social norms through the courts". It may increase the number of claims brought because it is cheaper and thereby nullify potential savings. If arbitration awards are routinely appealed, the number of cases in the court system will not be reduced.

24.2.12 The Summary Jury Trial

This is an involuntary, nonbinding procedure in which a mock jury is empanelled by the court to hear summary evidence and argument. The jury reaches an advisory verdict and the lawyers can question the jury about their deliberations. This promotes settlement by giving the lawyers information regarding likely jury reactions.

This is a good method of breaking an impasse in negotiations. It also forces counsel to prepare early.

However, counsel must reveal their game plan before trial. (Nova Scotia's rules of court have, for nearly 20 years now, fostered this so this would not be seen as a disadvantage here.) The jury does not hear witnesses and so cannot test the truth of the claim. It may discourage the initiation of negotiations and there is no empirical data to suggest that it encourages settlement.

24.2.13 Litigation

Litigation in the traditional court system is an involuntary, binding adjudicative procedure. It is formal, and can be expensive and lengthy. It is most appropriate when resolving questions of public interest such as constitutional, environmental, and civil rights issues. Litigation is concerned with more than the particular dispute. It develops precedents which guide people in their daily activities and in the settlement of disputes. In short, it creates and adapts law. Even its negative aspects have one redeeming feature at least: they promote settlement.

24.3 Criticisms of ADR

While each form of ADR has its own advantages and disadvantages, a substantial number of criticisms are directed at ADR in general:

(1) Processes like mediation and arbitration are inappropriate when the parties are not equal in power or are unrepresented.

(2) If ADR fails to produce settlement, another step has been added to the process.

(3) If the process is mandatory the benefits may not be achieved. If the process is voluntary it can only succeed if the parties want to settle.

(4) ADR is second class justice for the disadvantaged.

(5) Most ADR processes are private and confidential. Precedents are lost and the establishment of public legal norms retarded.

(6) ADR requires able, qualified personnel but there are not enough of them.

(7) Some ADR processes do not provide for appeals. If errors or law or fact occur they cannot be corrected.

(8) If participants are required to pay for the ADR process, only the rich and the state will benefit.

(9) If ADR is compulsory, it may deprive the parties of their day in court.

(10) If ADR is effective it might increase the number of claims brought and create a backlog of claims with little value or merit.

(11) Some processes are unsuited to dealing with cases that involve complex issues of law.

(12) One of the reasons for resorting to ADR, the existence of a litigation explosion, is a myth. There is no such explosion. If the court process was properly managed there would be no backlog.

(13) Individual rights are sacrificed in order to achieve a compromise.

(14) In an effort to achieve compromise some of the "due process" safeguards of the judicial process are ignored.

(15) By diverting cases from the courts, society loses the benefit of court sanctioned judgments.

(16) Settlements lack the legitimacy of cases fully adjudicated to judgment.

24.4 Summary

There are those who enthusiastically support ADR and those who reject it just as enthusiastically.

The Canadian Bar Association Task Force on ADR has made many recommendations, all of which support the integration of ADR techniques with public institutions such as schools, businesses, professions and governments.

> *The integration of ADR into the Canadian Society raises the real potential of a positive and fundamental change in the approach Canadians take to dealing with conflict. This change could affect the atmosphere in our schools, the cost and effectiveness of our Canadian system of justice and our approach to such critical and complex issues as the preservation of the environment and the*

> *disposition of native land claims.* [163]

In short, the CBA Task Force accepts ADR as a good thing on the philosophical ground that it will reduce confrontation in Canadian Society.

The British Columbia Report of the Justice Reform Committee, 1988,[164] recommends more study of ADR but is generally supportive based on a similar philosophical stance rather than on pragmatic considerations like cost and delay reduction.

Mr. Justice Zuber also considers ADR to be a good thing but he appears to predicate his support upon cost and delay reduction.[165]

On the other hand, there are those who oppose ADR on philosophical grounds. In the United States, Professor Fiss declares:

> *"Settlement is for me the civil analogue of plea bargaining. ... Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."* [166]

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[163] *"Alternate Dispute Resolution: A Canadian Perspective", the CBA Task Force Report, August 1989, at p. 77.*

[164] *See p. 180 and following.*

[165] *At p. 200, and following.*

[166] *Fiss, Owen, "Against Settlement" (1984), 93 Yale L. J. 1073, at p. 1075.*

So there appear to be two major reasons for an increasing interest in ADR. One is philosophical: a preference for dispute resolution that emphasizes compromise rather than "winner take all"; consensus rather than confrontation; community values over individualism. In short, a society that is harmonious, not litigious.

This is interesting not least because it is contemporaneous with the Canadian Charter of Rights and Freedoms. The Charter emphasizes the protection and furtherance of individual rights. Prior to the Charter, Canadians were characterized as rather malleable souls, inclined toward compromise rather than fighting for principle. We seem to have been rather well disposed to ADR before we knew what it was.

The Charter sets a different tone, leading us to wonder what kind of society Canadians want and how this is to be reflected in our dispute resolution processes.

The second reason for increased interest in ADR is the more prosaic one: the need for speedy, cheap and efficient dispute resolution mechanisms that are well adapted to the issues the parties need resolved. This would not appear to conflict with the current emphasis on individual rights but simply represents an attempt to introduce what amounts to mechanical improvements to the dispute resolution process. In other words, there is no attempt at social engineering.

24.5 Conclusions

ADR is among the matters specifically enumerated in our mandate. In the narrow sense, it is a structural question. We are a largely technical group looking at the structure of the courts of Nova Scotia. From this point of view we offer some suggestions on the use of referees, masters and pre-trial conferences in various parts of our report. These are all aspects of ADR though they represent fine tuning of the system as opposed to a radical departure from it. We are comfortable making recommendations on these procedural matters.

We can also say that many other examples of ADR are compatible with and complimentary to the court system. There are certainly drawbacks – chiefly the loss of precedents wherever private dispute resolution is resorted to – but we think it unlikely that ADR would produce such an alarming drop in cases for our courts that this would seriously impair the development of Nova Scotian law. In fact, we think ADR is more likely to facilitate earlier settlement of cases that would have been settled in any event and, from this point of view, nothing is lost in terms of public law and much is gained in terms of court management. If we are correct in this, it is in the interests of the taxpayers of Nova Scotia that the Government encourage forms of ADR that facilitate early settlement of cases that would be settled in any event.

However, the social engineering benefits claimed for ADR raise public policy questions. As a largely technical task force, we are in no better position to comment on these questions than any other group of specialists and we do not think it is a question for specialists. True, most of us are lawyers and lawyers are in the dispute resolution business but they are by no means the only profession involved in dispute resolution. Questions such as: "How litigious should our society be?" "Should our dispute resolution systems tend to promote harmony or vindication of individual rights?", should not be left to lawyers. They require broad public input. Regrettably, these questions were not addressed in the discussions surrounding the creation of the Canadian Charter of Rights and Freedoms. Nevertheless, the Charter has had a profound impact on our society and our dispute resolution systems. Public policy decisions have consequences whether they are discussed or not.

We think that a less adversarial approach to dispute resolution is a goal worthy of further study but it should proceed with due regard to the larger philosophical question of what kind of society we wish to create.

25. ADMINISTRATIVE PERSONNEL AND THEIR APPOINTMENT

25.1 Appointment Procedures

With the exception of the Family Court, senior management and administrative positions, as well as clerks, prothonotaries, and a number of other positions within the public offices, are appointed by Order in Council. Clerical positions and lower echelon administrative positions are classified in accordance with Civil Service Commission standards. Positions are advertised and filled on the basis of open competition.

It will not be enough to reorganize and consolidate the structure of our courts, including their administrative structure, unless we have the best people, chosen on the basis of merit, working as administrators within the system. Although some very capable persons are appointed by Order in Council, this practice can have two important negative effects: (1) senior administrators appointed in this way are very likely not professional court managers and therefore do not bring to the job the particular expertise necessary to increase administrative efficiency; (2) this situation sharply reduces the opportunity for junior administrative personnel to work their way up through the system to reach a senior management position. The inability to reach the top position on the administrative ladder will frustrate and discourage ambitious and meritorious personnel and will blunt their desire to work for greater achievement in administrative efficiency.

Recommendation 109

The practice of filling senior management and administrative positions as well as clerks, prothonotaries and other positions within public offices by Order in Council should cease. All such positions should be filled on the basis of an open competition.

26. COURT FACILITIES

26.1 Demands upon Facilities

Although the subject of court facilities is not specifically mentioned in the terms of reference of the Task Force, it has become clear to us that it is a problem that is inextricably part of other issues that are within our terms of reference upon which we have received written and oral submissions. That court facilities are an issue was made clear at many of our public hearings and in submissions received. Victims' rights groups and those involved with counselling victims of intra-family violence spoke of the need for separate waiting areas for victims and witnesses, areas that are removed from the place where the accused might be situated. Court clerks complained of a lack of vault space and secure areas within court houses. Disabled persons groups spoke of the need for suitable physical access and facilities. Provincial Court judges stressed the need for adequate security as well as public space within court houses. Physical separation from the police, Crown prosecutors and the accused was particularly emphasized by the members of the judiciary. Lawyers spoke of the need for consultation rooms that would provide a bare minimum of privacy so that they might interview their clients and witnesses. All of this suggests that the question of physical facilities is clearly a problem that should be considered as part of the general review of court restructuring.

26.2 Considerations

26.2.1 Symbolic Value

Court house accommodation is only one aspect of the administration of justice, but, it is an important one. Whether we like it or not, the court house is a physical symbol of the justice to be meted out inside. If the court house facilities are poor and dysfunctional, the impression conveyed carries over to the quality of justice that can be expected inside the building. As Mr. Justice McRuer observed:

> *"When accommodation for the magistrates courts in which the administration of justice for the community is carried on is compared with accommodation that is provided for such operations as the work of the committees of a city council, the board of education and the other municipal and government offices in the city, one cannot come to any other conclusion than that those responsible have no concept of the elementary rights of accused persons and witnesses who may attend trials and the rights of the public to have justice administered with dignity and in circumstances that convey a respect for the law."* [167]

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[167] *McRuer Commission Report at p. 539, quoted in Zuber at p. 235.*

26.2.2 Current Needs

We agree generally with these sentiments. We do not, however, advocate or support provision of ostentatious or luxurious court facilities. But we do see the need for efficient, functional court houses that meet the basic needs of users.

Our consideration of this issue has led us to focus on three important needs: (1) uniform standards of design, construction and accommodation; (2) rational court house location; and (3) facilities capable of housing necessary support services.

Under current arrangements, the Provincial Government provides all staff, furniture, equipment and supplies for Supreme and County Court judges. The municipal governments are required by legislation to provide adequate court facilities for the Supreme and the County Courts. This appears to be an area where there is constant negotiation with municipal units by the Courts and Registries Division of the Attorney General's Department to ensure that adequate facilities are provided. The Provincial Government is also required to provide adequate court facilities for the operation of the Provincial Court and the Family Court, but may utilize space owned and operated by individual municipalities. For example, the Provincial Court can sit in the County Court House or use other town or municipal facilities if these facilities are not being used for Supreme Court, County Court or municipal affairs.

26.3 Uniform Standards

The quality of court house accommodation varies considerably within the Province, even with regard to the same level of court. This may be the result of different factors, including the level of municipal finances, shifts in population, geographical circumstances or historical factors. Some variation is to be expected, but the fact is that some of the accommodations, provided for Provincial Courts in particular, are wholly unsuitable, undignified and, in a few instances, may even be unsafe.

A Court House Standards Committee was established in 1989 with the objective of developing standards for court house design and construction. This committee has recommended that the Province accept the full financial responsibility for all court houses and associated offices and that a long range plan for the replacement of several existing court house structures be developed. Curiously, the Province is currently responsible for providing court facilities for Provincial Court and yet it is this level of court which seems to suffer most from inadequate facilities. The reasons for this are not clear. In any event, this fact should at least prevent an automatic assumption that by having the Province take over complete funding of the court houses, all facilities will be improved.

26.4 Location of Court House Facilities

The consolidation of courts and court administration which we recommend should foster the development of consolidated court houses.

The possibility of consolidated court houses emphasizes the need to rationalize court house location. Is it better to have court houses where they now exist or to have fewer but better facilities in better locations? Such a development is a clear possibility and should be given serious consideration. In the nineteenth century, Jeremy Bentham consistently advocated the establishment of local courts within, at the very least, a half day's journey of every person. On this basis, with today's motor car or bus transportation, it would be feasible for most people to have access to a local court within a radius of 150 to 200 miles. In most cases, even allowing for some consolidation of courts, access to court facilities should not be more than one to one and a half hours away for all citizens. At present, in many parts of the Province, court facilities are within a 30-minute drive.

26.5 Support Services

Particularly in the area of family law and criminal law, there is a need for support services, in the form of counselling and assessment, to be physically located in or near the court house itself. Similarly, there is a real need to provide private discussion areas for lawyers and witnesses or lawyers and victims. It may not be possible to satisfy these needs fully in relation to existing court house facilities, but these requirements must be met in new court house construction projects.

Conclusion

Substandard court facilities are unacceptable. Court facilities should meet the needs of all who use them: judges, victims, witnesses, parties, lawyers, the staff, and the public, including the special needs of persons whose mobility, hearing or sight is impaired.

They must be dignified, though this does not imply ostentation. In the future they will have to accommodate court-related social services.

These facilities will be expensive and it is unrealistic to believe they can be scattered liberally and haphazardly throughout the Province. At the same time, design and standards must be uniform throughout the Province. For these reasons, we believe the Provincial Government should take over construction of new court facilities.

Recommendation 110

Existing court house facilities in Nova Scotia should be upgraded to conform to minimum standards of construction and design in consultation with major user groups.

Recommendation 111

The Province should assume responsibility for the provision of new court facilities for all levels of court in Nova Scotia.

27. COURT FUNDING

27.1 Conventional Wisdom

The conventional wisdom is that the justice system - particularly the courts - is underfunded. Canadians believe the justice system is important and deserves greater financial support.

Mr. Justice Zuber indicates that in Ontario one percent of the total provincial budget is spent on the justice system. He considered this totally inadequate.

However, the search for empirical data and objective standards is a difficult one.

27.2 Standards

27.2.1 The Price of Justice

What level of support should be provided for the justice system? One answer is summed up in the phrase "What price justice?" In other words, whatever financial resources are necessary to meet the needs of justice should be supplied. Obviously, this assumes an unlimited financial capacity. Less obviously, it also assumes that the input of money is directly related to output - so that more money produces more justice - and that there is an objective measure of the level of service required to "produce" justice. Experience does not support these assumptions.

We reject the "what price justice" philosophy, not because we wish to put a price on justice, but because same can be said of all services provided by government: what price health, what price housing, and so on. We live in a finite world and an allocation of resources to one area necessarily implies their diversion from another.

27.2.2 Comparative Methods

Instead, we looked at funding levels in other provinces. There are several obvious problems with this. Maybe all other provinces under-fund their courts; maybe they don't manage as prudently as frugal Nova Scotians. Or maybe just the opposite is true. We can't know. It was necessary for us to assume a reasonable distribution of competence among the provinces and recognize that precise conclusions can't be reached.

The next problem is determining the basis of comparison between provinces. For example, we can compare contributions as a percentage of the provincial budget or absolute expenditures on a per capita basis.

Contributions as a percentage of the provincial budget has an even greater potential to mislead because it compares the contribution to justice in each province with all other budget subjects in that province, not the contributions of the province with the contributions of other provinces. Thus a province that spends a great deal on its justice system but spends even more on education will appear to short change justice when compared with other provinces that spend a little less on justice and a lot less on education.

Per capita expenditures at least should show the amount of money a province spends on the court system, regardless of ability to pay or other spending priorities. However, these figures will not always indicate the level of service. For example, a geographically dispersed system operating court houses in numerous small communities may be relatively expensive to run because of high cost of physical plant but, if the judges don't get around to the individual court houses very often, the level of service may be lower than in a province where there are fewer court houses per capita but judges sit in them nearly every day. That is why, when looking at the expenditures per capita, the Yukon and the Northwest Territories far exceed even the wealthy provinces of Quebec, British Columbia and Ontario in terms of expenditure on the justice system. Yet it is doubtful that the level of service is two and three times higher than, say, in Quebec City or Victoria.

27.3 Per Capita Expenditure Comparisons

27.3.1 Stats Can

Statistics Canada publishes figures going back to the year 1970 on contributions by provincial governments to the support of the court system. Unfortunately these figures are of little comparative value to us because of three circumstances that exist in Nova Scotia:

(1) In Nova Scotia, unlike all of the other provinces, municipalities build and maintain nearly all the court houses.

(2) The Halifax City Court is paid for by the City of Halifax, not the Provincial Government.

(3) The Department of Community Services administers the Family Court.

These significant financial contributions to our court system do not appear to be included in the Statistics Canada figures. Therefore, the financial support provided by Nova Scotians is significantly understated when compared with other provinces where the Provincial Government support represents nearly the entire financial expenditure on courts. Though we could have adjusted the Nova Scotia figures to reflect the costs of Family Court and City Court, there is no way for us to calculate the municipal contribution in the form of facilities. Furthermore, these weaknesses in the Nova Scotia figures raise the possibility that there are variables that are unknown to us in respect of the figures for the other provinces. Therefore, we were forced to abandon the Statistics Canada figures as a useful basis of comparison.

27.3.2 Current Study

A study currently underway with the cooperation of the governments of nine provinces, including Nova Scotia, shows more promise because it attempts to adjust financial data to even out the differences between funding regimes in the provinces. Unfortunately the study is not complete and we have only a draft report so we cannot describe the contents in any detail.

We can say, however, that to the surprise of many, Nova Scotia contributes more per capita to its court system than the national average and ranks third among the nine reporting provinces. It ranks second among the provinces in terms of person years per one hundred thousand of population employed in the justice system.

Again, we hesitate to draw conclusions from these figures. Even when the report is finalized, it will only represent a rough comparison.

27.3.3 Legal Aid

The same general picture is true of legal aid. Of the three provinces operating a legal aid service delivered by staff lawyers, Nova Scotia reported (as of March 31, 1988) 107 lawyers (either on staff or on retainer as a result of conflicts or serious crimes), while Saskatchewan has only 71, though it has a similar population, and P.E.I. has only five. All the other provinces operate different systems that offer no such basis for a comparison. The number of lawyers is not the best basis of comparison. Accepted applications per thousand of population is probably more useful. Again Nova Scotia, surprisingly, is one of the leaders. Excluding the Territories, only Quebec at 35 successful applications for legal aid per 1000 of population exceeds Nova Scotia's 23 per thousand. The national rate is 19.

27.4 Limits of Funding

27.4.1 Funding

It is tempting to demand more funding for the justice system, but is it needed, and if it is, what assurance is there that it will be well spent? There is no data to say that the Nova Scotia government spends grudgingly on the court system. This is not the same as saying that it spends well, but if raw dollars represent priorities of government, then the Nova Scotia government is, at the very least, in the middle of the pack and, as some of the better figures suggest, is one of the leaders.

27.4.2 Managing

Paradoxically, the uncritical allocation of more money to the court system will remove one of the most significant pressures for reform. The first step in our view is better management of the resources provided. Although there is no objective method of quantifying the financial requirements of the entire Nova Scotia court system, we believe, on the basis of our work as a task force and on our collective experience, that there are areas of the court system where spending should be increased, and that we have made recommendations which, if followed, will require increased expenditures.

However, at the same time we have seen areas of the court system where there is waste - not in the sense of lavish spending but rather inefficiency and poor prioritization of tasks. With the implementation of better structures and management tools, the inefficiency should be significantly reduced and savings will result. Only after this has taken place will it be possible to evaluate the financial support required by the new court system. We feel strongly that, in the interim, the savings brought about by greater efficiency over the next several years should be reinvested elsewhere in the court system. That is, the overall contribution of government to the court system should not be reduced. The benefit of efficiencies will only be optimized if the savings are reinvested where required.

There isn't any consensus on how the funds should be "well spent". Regrettably, the court system operates on a hierarchical basis. This is breaking down but hierarchical thinking continues. So, during a recent newspaper interview, one critic of the funding of the justice system appears to have assumed that, because the superior courts did not have word processing equipment, none of the courts had modern computers. In fact, 16 of the 18 permanent Provincial Court locations had modern computer systems capable of word processing and communicating with each other and the Government of Nova Scotia's mainframe in order to perform sophisticated financial analysis. This is the result of a decision, which we commend, to place resources where the greatest number of cases are found - in the Provincial Court. However, the critics apparently assumed that the higher courts should receive the most sophisticated equipment first. Therefore, if one proceeds on the hierarchical basis, resources and demand are mismatched, but if one uses demand as a guide, they're well matched.

Recommendation 112

During the period of reorganization of the court structure, the financial support for the court system should not be reduced, but rather savings brought about through greater efficiency should be reallocated within the system.

Recommendation 113

Once there has been sufficient experience with the operation of the new court structure, the Government of Nova Scotia should undertake a thorough review of the funding needs of the court system in order to ensure that the courts receive the proper and adequate funding required to perform their functions and that the taxpayers of Nova Scotia receive value for their investment.

28. CONCLUSIONS

We have tried to make recommendations for changes in the court structure that are suited to conditions in Nova Scotia, that reflect rational divisions of function, and that simplify and provide flexibility and efficiency of operation.

The changes we recommend are not as drastic as they might have been. We have chosen evolution rather than revolution and tried to devise a structure that will be simple enough to be understandable and one that is malleable enough to be adaptable. Our objective has been to create a manageable system but we have refrained from making specific management recommendations on many issues, preferring to suggest procedures that might facilitate such decisions.

For example, if the Supreme Court is distributed throughout the province, it seems to us circuits can be eliminated, but that a new form of circulation will then be required. That is a matter for the Chief Justice of the new Supreme Court to experiment with. We do not want to tie her or him to "a solution". By the same token, if circuits can be eliminated, setting down days and terms - which seem inefficient to us - can be replaced by weekly lists or some other form of docketing. This seems very logical, but putting this procedure into practice may be another matter.

We think the people who must live with the consequences are better placed than we to deal with these management matters.

Our purpose has been to maintain a balance between providing fair and just judicial service to citizens while creating a structure that allows for effective management of resources. In the process of doing this we have been conscious of the need to provide decentralized judicial services that do not overemphasize specialization of judicial functions.

Our task has been made more difficult by the absence of useful information about many segments of the justice system in Nova Scotia. Admittedly, some progress is being made in this regard and we were very grateful for the information that was available and provided to us. But if the system is to be better managed, real management information is essential. There is no getting around it. The public will not sustain a large financial commitment to justice if they cannot measure the results, and there is no reason they should.

Public input to our deliberations has emphasized the importance of effective judicial structure and process in the area of Family Law. The need to explain and simplify legal language and procedures was stressed to us, as was the desirability of exploring non-adjudicative modes of dispute resolution. But how well a judicial system functions is not determined solely by the structure of its courts or the procedural rules and techniques employed. It depends, as well, upon external factors such as changes in substantive law reflecting social, economic and technological changes in our society. Internally, the judicial system's operations are influenced by the calibre of persons selected to function in the system and their ability to cooperate with each other while carrying out assigned tasks. Its effective functioning depends upon a satisfactory level of public funding and efficient use of resources by those managing the system.

There must also be a willingness to look beyond historically adopted positions and to examine personal interests more closely. For example, if you live in a small town you naturally do not want your court house closed. But is it in your best interest that you occasionally have a judge with limited powers in an inadequate facility? Or would it be better to have a full service judge sitting frequently in a proper facility an hour away?

We offered this dilemma to the members of the public who spoke to us. They would prefer not to choose. They want full service right next door. But, if they had to choose, they would travel a bit further to get better service. We think Nova Scotia has to choose. Our recommendations will tend towards full, frequent service in well equipped multi-disciplinary, well located facilities no more than one to one and one-half hours away.

Not every dispute needs to go before a judge. Not every aspect of a dispute needs to go before a judge. This has implications for ADR, court unification and facilities.

We have also considered whether it is realistic to attempt a simplification of the court system when everything else is getting more complex. A unified court may be a simpler structure but it may quickly evolve procedural complexities. Some trends are mutually inconsistent to one degree or another. ADR tends toward multiple dispute resolution systems. Court unifiers want "one-stop shopping". This fosters hybrids and compromises, all of which tends to complexity. There is no absolutely right answer to the question. We have taken an optimistic approach and made our recommendations accordingly.

We view the justice system and the framework of courts as an absolutely vital part of our social fabric. Like any other mechanism, it needs to be reviewed and assessed from time to time to ensure its most effective operation. We have criticized and commented on many aspects of the system, but this should not be seen as a blanket condemnation of the current court system. That is not the case. It is true that we found no part of the system that did not need improvement, but this does not mean the system is bankrupt. We did not recommend changes where changes are not needed. We found tremendous enthusiasm for change among the people working in the system. In the final analysis, that is the critical point.

Our comments and recommendations have been made in the hope that, if implemented, they will provide a workable court structure, one that is capable of adapting to and accommodating our future needs.

29. SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Trial Division of the Supreme Court of Nova Scotia and the County Court should be merged to form a new court called the Supreme Court of Nova Scotia.

The present judges of the Trial Division of the Supreme Court and the County Courts should be the judges of the Supreme Court.

There should be an Associate Chief Justice of the new court.

No judge should be required by the Executive branch of government to change residence because of the creation of the Supreme Court.

Recommendation 2

The judges of the Supreme Court should circulate throughout the Province as directed by the Chief Justice of the Supreme Court.

When establishing the circulation of judges, the Chief Justice shall consider:

(a) the need for expeditious and equal access to the Supreme Court in every part of the Province to the greatest extent practical;

(b) the need to balance the workload and travel responsibilities among the judges of the court;

(c) the desirability of establishing a degree of specialization among members of the court;

(d) the desirability of providing a variety of judges throughout the province.

Recommendation 3

The present Appeal Division of the Supreme Court should be re-established as a separate court of appeal called the Nova Scotia Court of Appeal.

All members of the present Appeal Division of the Supreme Court of Nova Scotia be members of the new Court of Appeal.

The jurisdiction of the Nova Scotia Court of Appeal be the same as the jurisdiction of the present Appeal Division of the Supreme Court of Nova Scotia.

All members of the Supreme Court should be ex officio members of the Nova Scotia Court of Appeal by virtue of their appointment.

Recommendation 4

The Province should be divided into judicial regions for the purposes of the Supreme Court.

Judicial appointments should specify the region in which the appointee is to reside.

Judges should be appointed to a region on the basis of regional demand as a proportion of total province wide demand but in no case should there be fewer than two judges in each region.

There should be four judicial regions: Cape Breton, Central (composed of the Counties of Guysborough, Antigonish, Pictou, Colchester, Cumberland, plus the area served by the courthouse in Shubenacadie), Halifax (Halifax County), and Southwestern (the counties of Hants, Kings, Annapolis, Digby, Yarmouth, Shelburne, Queens and Lunenburg).[168]

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[168] *The population and distribution of judges and lawyers by region is set out in Appendix 5.*

Recommendation 5

A unified family court should be created as a Division of the Nova Scotia Supreme Court.

The appointment of judges to the Family Division in each judicial region shall be determined on an objective basis: regional demand for Family Division services, as a proportion of total province-wide demand for Family Division services, but there should be at least two Family Division judges in each region.

There should be an Associate Chief Justice who is a member of the Family Division.

Recommendation 6

In general, the power of the Chief Justice of the Supreme Court to assign cases to judges and assign judges to one division or other of the Supreme Court should be used infrequently and in a manner consistent with the need to engender the degree of specialization required by family law.

This recommendation does not preclude the assignment of judges or cases in order to respond to temporary situations such as emergencies and local case backlogs.

Recommendation 7

The Department of Community Services should provide court-related social services to the Family Division of the Supreme Court.

Recommendation 8

A full range of court-related social services, including conciliation and mediation, assessments and professional counselling are required if the Family Court or the Family Division of the Supreme Court is to be fully effective.

Recommendation 9

The Family Division should have rules of procedure that facilitate the use of the court by unrepresented litigants.

The Family Division rules and forms should be simple and expressed in plain language.

Recommendation 10

There should be one youth court and, subject to the transfer procedures provided in the *Young Offenders Act*, all young offender matters should be dealt with in that court.

Recommendation 11

The Family Division of the Supreme Court should be designated the youth court for Nova Scotia.

Recommendation 12

The Family Division of the Supreme Court should assume the jurisdiction currently exercised by the Family Court in relation to offences involving family members. At a future date, consideration should be given to expanding the jurisdiction of the Family Division to include other Criminal Code offences involving family members.

Recommendation 13

The Department of Attorney General, Community Services and Solicitor General should monitor the Manitoba Family Violence Court experience and should consider a similar pilot if preliminary results from Manitoba are favourable.

Recommendation 14

If a Nova Scotia pilot project demonstrates that the Provincial Court can deal effectively and sensitively with the concerns of victims, witnesses and the accused, our recommendation that domestic violence ought to be dealt with in the Family Division of the Supreme Court should be reconsidered.

Recommendation 15

Judges, lawyers, police, prosecutors and court staff should receive regular, specialized training to ensure they understand the unique nature of domestic violence and to ensure that they keep abreast of developments in this field.

Recommendation 16

The Government of Nova Scotia should, in relation to family violence, promote and encourage more effective needs assessment and planning; better service coordination; stronger client advocacy; public and professional education; prevention strategies and development of treatment programs for batterers.

The Government should develop a coordinating mechanism to ensure that the current initiatives, in relation to family violence, and those recommended above are implemented in an effective manner so as to inform and educate the public; help and protect the victim; and deter and rehabilitate the perpetrator.

Recommendation 17

The Province of Nova Scotia should allow people who are eligible for Family Benefits to assign maintenance or support payments, to which they are also entitled, to the Province and, in return, receive Family Benefits as if they were not entitled to maintenance or support.

Recommendation 18

The present restrictions on open hearings in Family Court should be removed and replaced with a judicial discretion to order in camera hearings in prescribed circumstances.

Recommendation 19

We support the principle of a unified criminal court, but implementation should not take place until at least one pilot project has been established in Canada and assessed and the Law Reform Commission of Canada has provided opinions regarding bail reviews, applications for prerogative writs and summary conviction appeals under a unified criminal court system.

Recommendation 20

The "Quebec model" should not be adopted at this time but, if no pilot of the unified criminal court is established in Canada within three years, the division of jurisdiction between the Supreme Court and the Provincial Court should be carefully re-examined and the "Quebec model" should be favourably considered among the possible options.

Recommendation 21

The Government of Nova Scotia should eliminate all basis for a perception of status differences between criminal trial courts by addressing differences regarding judicial forms of address, quality of courtroom facilities, and courtroom support staff.

Recommendation 22

Crown attorneys should be directed to initiate discussions with defence counsel regarding full disclosure by the Crown and admissions by both parties.

Recommendation 23

In order to ensure the continued evolution and maintenance of a suitable mechanism to provide and enforce full disclosure, there should be a standing committee representing defence counsel, Crown attorneys, the R.C.M.P., municipal police forces and lay representatives to study the matter and make recommendations, including the desirability of legislated standards, to the Attorney General from time to time.

Dan Paul dissents from this recommendation and recommends a legislative standard of disclosure be enacted.

Recommendation 24

We recommend continuation of the office of justice of the peace.

Recommendation 25

The Provincial Government should provide justices of the peace with an updated practice manual, training seminars for newly appointed justices of the peace, and a continuing education program.

Recommendation 26

Greater supervisory control should be established over justices of the peace. This control should be exercised by a judge of the Provincial Court. One judge of that court should be appointed as an associate chief judge responsible for justices of the peace.

Recommendation 27

There should be fewer justices of the peace and they ought to be distributed as needed. Vacancies ought to be advertised and appointments made by the Governor

in Council on the basis of merit after consultation with the Chief Judge of the Provincial Court or the Associate Chief Judge responsible for justices of the peace.

Recommendation 28

Since most justices of the peace will continue to serve on a fee for service basis, some kind of rotation system is needed in order to avoid any suggestion of police influence and to comply with Charter requirements of independence. If "presiding" justices of the peace are appointed, they should be paid as Small Claims Court adjudicators are now paid.

Recommendation 29

Justices of the peace should be authorized to conduct civil marriages.

Recommendation 30

The Governor in Council can continue to appoint public servants as justices of the peace as long as their commissions limit them to non-adjudicative tasks and they can function effectively.

Recommendation 31

The practice of justices of the peace issuing search warrants should cease. Search warrants should be the responsibility of Provincial Court judges.

Recommendation 32

On the basis of present information, justices of the peace should not be upgraded to hear contested minor provincial traffic offences or municipal bylaw violations.

Recommendation 33

If factual data shows the need for additional adjudicative personnel, legally trained individuals with three years' experience at the bar should be appointed as "presiding" justices of the peace to hear contested matters not involving the Crown, such as municipal bylaw violations.

Recommendation 34

The Halifax City Court should be abolished and the administration of the court be brought under Provincial control.

Recommendation 35

Procedures for enforcement of motor vehicle moving and parking violations should be amended to allow ex parte convictions where the accused fails to appear.

Recommendation 36

The present staff of the City Court should be integrated into the Provincial Civil Service without detriment to them.

Recommendation 37

Upon request by the Band Council at Indian Brook Reserve or Eskasoni Reserve, the Provincial Court and the Family Court should hold regular sittings in those communities.

Recommendation 38

Native justice committees should be established to consult with crown attorneys and advise judges on sentencing and to facilitate, in conjunction with the Solicitor General's Department, alternative penalty and fine options programs in their community.

Recommendation 39

The Small Claims Court should be maintained as is, a separate court with hearings conducted by legally trained adjudicators.

Recommendation 40

The Small Claims Court should have exclusive civil jurisdiction up to $5,000.00. This limit should be reviewed periodically.

Recommendation 41

Small Claims defendants should be required to file a simple defence indicating at least that the claim will be contested.

Recommendation 42

The *Small Claims Court Act* and forms should be amended to allow defendants to file a simple form of defence if they intend to defend the claim.

Recommendation 43

The *Small Claims Court Act* should be amended to allow the adjudicator to order default judgment without a hearing when

(a) the defendant files a defence but does not appear at the time scheduled for the hearing of the matter; or

(b) the defendant does not file a defence within a reasonable time specified in the Act and the plaintiff furnishes written proof of service and the basis of the claim.

Recommendation 44

The practice of having the order of the Small Claims adjudicator confirmed by a County Court judge should be abolished and the *Small Claims Court Act* be amended to provide the Small Claims Court with its own execution process.

Recommendation 45

The *Small Claims Court Act* should be amended to require either the written decision, if there is one, or a summary of findings of fact and law if there isn't, to be filed with the court hearing the case on appeal.

Recommendation 46

We do not recommend the inclusion of mediation as a required step in the Small Claims procedure at this time.

Recommendation 47

Greater use of the Small Claims Court may necessitate additional personnel to assist litigants with information on forms and procedures. The Department of Attorney General should formally recognize the consumer service aspect of the duties of the court's support staff. A major element of this should include training in interpersonal skills and the legal system in general. Employment of graduates of community college law programs as court staff would facilitate the flow of information.

Recommendation 48

We believe that the government must move quickly to fully implement the Victims' Services Program in the Department of Attorney General including both the community based, non-profit helping agencies and the staff services programs in order to provide:

(a) general information about the criminal justice system;

(b) information about the specific case in which the victim is involved;

(c) liaison with prosecutors, police and other professionals;

(d) general assistance in the completion of forms such as victim impact statements and compensation claims;

(e) assistance in preparation of victims and family members for court including accompaniment to court hearings; and

(f) generally emotional support to all victims, members of their families and other associated persons to guide them through the legal process.

Recommendation 49

Crown attorneys, and court staff, particularly officers such clerks and court security, should receive specific training in victims concerns and the effects of violence on individuals and their ability to give evidence.

Recommendation 50

Crown attorneys should be given enough time to enable them to address victim and witness concerns in sensitive cases such as sexual assault, domestic violence, robbery with violence and, generally, cases involving children.

Recommendation 51

Sensitivity on victims' issues should be included as an element of the selection process for judges and court personnel.

Recommendation 52

The Director of Public Prosecutions should establish a program that will allow Crown attorneys to develop the techniques and familiarity required to deal with cases of domestic violence, sexual assault and child abuse. This may take the form of a permanent special unit or a program that many or all Crown attorneys circulate through. The choices are an operational matter.

Recommendation 53

The Attorney General should establish a plain language committee to develop a strategy for implementation of plain language in the justice system in Nova Scotia.

Recommendation 54

The Attorney General should ask the Nova Scotia Law Reform Commission to develop draft legislation that:

(a) standardizes the powers and procedures of administrative tribunals;

(b) guarantees parties appearing before the tribunals basic procedural rights and safeguards;

(c) simplifies administrative law, particularly with regard to judicial review and appeals;

(d) ensures the requisite degree of independence when a tribunal is required to act in a judicial fashion.

Recommendation 55

We agree in principle that the use of masters makes good sense but, in light of the uncertainties surrounding present and future judicial workloads at the Supreme Court level, we do not recommend the appointment of masters at this time.

Recommendation 56

Greater use of referees should be made by courts and litigants in selected, suitable cases. In particular, surveyors should be used as referees in land dispute cases involving boundary questions.

Recommendation 57

Courts ought to consider the use of a broad range of technically trained referees to assist them with complex, technical questions of fact.

Recommendation 58

The Chief Justices of the new Nova Scotia Court of Appeal, the Supreme Court of Nova Scotia and the Chief Judge of the Provincial Court (or, the Chief Justice of the Trial Division of the Supreme Court and the Chief Judges of the Family, Provincial and County Courts) should be given the following authority by statute:

POWERS AND CHIEF FUNCTIONS OF THE CHIEF JUDGE (JUSTICE)

(1) The Chief Judge (Justice) shall be responsible for the judicial functions of the court and, without limiting the generality of the foregoing, shall have the power and exercise the duty to:

- (a) supervise and direct the sittings of the court;
- (b) coordinate, apportion and administer the work of the judges;
- (c) designate the case or matter, or class of cases or matters in which a judge shall act;
- (d) assign a judge to the duties the chief judge (justice) considers advisable;
- (e) assign circuits for each judge having regard to the need for circuits and the availability of suitable facilities and court staff;
- (f) approve times of vacation, leaves of absence, sick leave, and continuing education;
- (g) designate the court facility where a judge shall act;

(h) designate places other than a court facility, where the court may sit and a judge shall act;

(i) order that a matter be reheard or, with the consent of counsel, continued before another judge, where a judge (i) for any reason fails to complete a hearing or, (ii) having completed a hearing, fails to render a judgement;

(j) ensure proper judicial behaviour is observed;

* (k) review any matter concerning the conduct of a judge which comes to the attention of the Chief Judge, including a complaint, and

   (i) attempt to resolve a complaint informally,
   (ii) advise a complainant that there is no basis for the complaint,
   (iii) refer the complaint to the judicial inquiry board, or
   (iv) upon receipt of a recommendation by the judicial inquiry board, to suspend a judge or require a judge to take a leave of absence, with or without pay, for the purpose of obtaining remedial treatment or instruction;

(l) establish general policy for the court in respect of the matters enumerated herein;

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* applies only to provincially appointed judges.

(m) exercise the other powers and perform other duties prescribed for the Chief Judge (Justice) by the Lieutenant Governor in Council.

(2) The Chief Judge (Justice) may delegate to an Associate Chief Judge (Justice) such of the powers enumerated in subsection (1) as the Chief Judge (Justice) considers appropriate.

(3) An Associate Chief Judge (Justice) shall assist and advise the Chief Judge (Justice) and shall carry out duties delegated pursuant to Section 2 or otherwise assigned by the Chief Judge (Justice).

(4) Subject to the provisions of the Act, a judge shall comply with orders and directions given pursuant to this Section.

Recommendation 59

There should be a clear division between the investigative/prosecutorial and the adjudicative functions in judicial discipline proceedings and the two functions should be dealt with by different bodies.

Recommendation 60

The *Judges of the Provincial Court Act* and the *Family Court Act* should be amended to establish a new judicial disciplinary process having three tiers:

(a) the Chief Judge;

(b) an investigative body (called the Judicial Inquiry Board) to investigate and prosecute more significant matters and, where requested, to consider complaints dealt with by the Chief Judge; and

(c) an adjudicative body (called the Judicial Council) to hear and determine charges brought by the Judicial Inquiry Board.

Recommendation 61

Complaints (other than those against the Chief Judge) should be directed to the Chief Judge of the relevant court and complaints respecting the Chief Judge should be directed to the Chief Justice of Nova Scotia who, for this purpose, has all the powers of a Chief Judge.

Recommendation 62

The Chief Judge should be empowered to deal with complaints by:

(a) attempting to resolve the matter informally;

(b) advising the complainant that there is no basis for a complaint or that a more appropriate avenue should be pursued (such as an appeal from the judicial decision giving rise to the complaint);

(c) referring the complaint to the Judicial Inquiry Board; or

(d) on the recommendation of the Judicial Inquiry Board, suspending a judge (with or without pay) or requiring a judge to take a leave of absence (with or without pay) for the purpose of obtaining remedial treatment or instruction.

Recommendation 63

A complainant or judge who is dissatisfied with the disposition of the complaint by the Chief Judge should be entitled to take the matter to the Judicial Inquiry Board.

Recommendation 64

The Chief Judge ought to be required to inform all complainants that, if they are dissatisfied with a disposition of the complaint by the Chief Judge, they may take the matter to the Judicial Inquiry Board.

Recommendation 65

Complaints to the Chief Judge and the Judicial Inquiry Board must be in writing and signed by the complainant.

Recommendation 66

The Chief Judge should be empowered to review, on his or her own initiative, any matter regarding the conduct or fitness of a judge which comes to his or her attention; and the Judicial Inquiry Board ought to have the same power.

Recommendation 67

The Judicial Inquiry Board should be comprised of three persons:

(a) a lawyer appointed by the Lieutenant Governor in Council;

(b) a person who is not a lawyer, judge or retired judge, also appointed by the Lieutenant Governor in Council; and

(c) a judge named by the Provincial Court judges or the Family Court judges. This member shall not be the Chief Judge. In the event that this member becomes the subject of a complaint to the Judicial Inquiry Board, he or she shall be replaced by another person named by the relevant judges until the complaint is disposed of.

Recommendation 68

Members of the Judicial Inquiry Board should hold office for terms of two years and continue to hold office pending disposition of any matter extending beyond the term.

Recommendation 69

Members of the Judicial Inquiry Board may have their terms renewed twice only.

Recommendation 70

Members of the Judicial Inquiry Board and persons who are employed or retained by them as investigators should have all of the powers, privileges and immunities of a Commissioner under the Public Inquiries Act.

Recommendation 71

The Judicial Inquiry Board should have the power to engage counsel and agents as they determine appropriate.

Recommendation 72

Upon receipt of a complaint (or upon initiation of an investigation on its own motion), the Judicial Inquiry Board should have the power to:

(a) investigate the matter;

(b) informally resolve the matter, if it can obtain the agreement of the judge in question and the complainant (where there is one);

(c) lay charges of misconduct before the Judicial Council;

(d) not lay charges;

(e) prosecute charges laid;

(f) stay charges; and

(g) refer the matter to the Chief Judge with a report and recommendation of sanctions to be applied.

Recommendation 73

Decisions of the Judicial Inquiry Board can be made by a majority of its members.

Recommendation 74

The decision to lay charges, not lay charges, or stay charges shall be within the sole discretion of the Judicial Inquiry Board and no appeal shall lie from such decisions.

Recommendation 75

Where the Judicial Inquiry Board decides not to lay charges against a judge, it shall give a written explanation of its decision to the complainant.

Recommendation 76

The Judicial Council should be composed of seven persons, namely:

(a) the Chief Justice of Nova Scotia, or another judge of the Court of Appeal designated by him or her;

(b) the Chief Justice of the new Supreme Court (or the Trial Division of the Supreme Court as the case may be), or another judge of that Court designated by him or her;

(c) two judges of the same court as the accused judge, named by the judges of that Court;

(d) the President of the Nova Scotia Barristers' Society or his or her designate;

(e) two persons, who shall not be lawyers, judges or retired judges, appointed by the Lieutenant Governor in Council.

Recommendation 77

The quorum for the Judicial Council should be five, of whom one shall be a judge of the same court as the accused judge and one shall be a lay person.

Recommendation 78

The following persons should not be members of the Judicial Council:

(a) the Chief Judge of the same court as the accused judge; and

(b) any sitting member of the Judicial Inquiry Board.

Recommendation 79

Any person who has participated in the receipt of investigation of a complaint against a judge of the Provincial Court shall not participate as a member of the Judicial Council in any proceeding of the Judicial Council respecting that complaint.

Recommendation 80

The Chief Justice of Nova Scotia or his or her designate should chair the Judicial Council.

Recommendation 81

The term of office of the members of the Judicial Council who do not sit ex officio (the lay people and the provincial judges) should be three years.

Recommendation 82

The members of the Judicial Council who do not sit ex officio should be eligible to be reappointed once only.

Recommendation 83

There should not be provision for suspending a judge while an investigation into his or her conduct is pending. However, the Chief Judge is free to reassign such a judge to administrative duties.

Recommendation 84

Upon the filing of charges against a judge by the Judicial Inquiry Board, the judge should be automatically suspended unless the Judicial Inquiry Board waives the suspension.

Recommendation 85

Unless a member of the Judicial Council (designated for the purpose by the chair of the Judicial Council) decides otherwise upon an application of the Judicial Inquiry Board, the suspension of a judge should be with pay.

Recommendation 86

The member of the Judicial Council who hears such an application for suspension of a judge without pay should be barred from further participation in the matter.

Recommendation 87

Judicial Council hearings should be held in private unless the accused judge requests an open hearing.

Recommendation 88

The Judicial Council should be empowered to dispose of matters heard by it in either of the following ways:

(a) by dismissing the complaint;

(b) by removing the judge; or

(c) where the judge is unable to perform the duties of his or her office by reason of disability, by ordering that the judge be deemed to have voluntarily resigned with full pension.

Recommendation 89

The Judicial Council should have the authority to hear moot cases. The departure from office of a judge should not determine the jurisdiction of the Judicial Council in the matter.

Recommendation 90

Both the judge and the Judicial Inquiry Board should be permitted to appeal a decision of the Judicial Council (as to guilt or penalty or both) to the Court of Appeal.

Recommendation 91

The Judicial Council shall accord high priority to the development of a Judicial Code of Conduct, breach of which would be grounds for disciplinary action.

Recommendation 92

The Attorney General should not be treated differently from other complainants. Complaints by the Attorney General should be made and dealt with in the same manner as those of any other complainant.

Recommendation 93

The decision of the Judicial Council in any matter involving disciplinary action against a judge should be reported to the Attorney General.

Recommendation 94

Judges should not be subject to the enforcement provision of the *Human Rights Act* when acting judicially. Conformity to the standards of the Act at all times is essential and judges should be subject to the discipline procedures generally applicable to judges for any infringement of those standards when acting judicially.

Recommendation 95

Caseflow management techniques should be developed and applied, where appropriate, to the dispute resolution process generally.

Recommendation 96

The judiciary should take the lead in a cooperative effort with the bar, prosecutors and court administrators to establish acceptable criteria for caseflow management.

Recommendation 97

Proposals to overbook courtrooms in order to better utilize judicial time should be implemented.

Recommendation 98

Information gathering procedures should be instituted and the necessary technology required to provide the information relevant to delay should be provided.

Recommendation 99

The judiciary, the Nova Scotia Barristers' Society, the Director of Public Prosecutions and the Departments of Attorney General and Community Services should co-operate to establish court management advisory committees similar to Ontario's in each of Nova Scotia's judicial regions.

Recommendation 100

The first goals of the court management advisory committees should be to cooperatively:

(a) set caseflow management goals;

(b) define precise strategies to achieve those goals;

(c) facilitate the employment of those strategies; and

(d) monitor the employment of those strategies.

Recommendation 101

The present M.I.S. (Management Information Systems) should be extended to provide for the collection and analysis of additional data and the proposed program for collecting civil case statistics be advanced in time.

Recommendation 102

The M.I.S. Section of the Department of Attorney General should consider the feasibility of the complete electronic filing system to replace the present paper filing system in the court registry. The objective would be to create a computerized electronic data base so that each file could be searched by remote terminal. The potential cost savings to taxpayers and litigants from electronic filing and storage of court documents is significant but we recognize there are also technical and legal problems to be overcome.

Recommendation 103

A central judgment registry should be created to facilitate the enforcement of court judgments. There should also be remote access to such a data base.

Recommendation 104

A pilot project should be developed for the facsimile filing of documents. Such facsimile filing will increase access to court registries and reduce costs to litigants, particularly in the rural areas of the province.

Recommendation 105

The M.I.S. Section of the Department of Attorney General should consider the feasibility of expanding the current program of computerizing data bases such as the grantee/grantor index for real property to develop other data bases which could be accessed by the public and the bar.

Recommendation 106

Judicial decisions currently being typed in the ordinary way by secretaries should be typed in machine readable form so as to create a decision data base. These cases should be accessible to the judges and the bar and perhaps eventually to the public itself. Such access would be paid for and would thus generate revenue for the government.

Recommendation 107

The M.I.S. Section of the Department of the Attorney General should explore the use of technologically sophisticated methods of providing transcripts of trial evidence, including C.A.T.

Recommendation 108

To complement the proposed regional court administration and structure, a feasibility study should be made of the possibility of using closed-circuit or satellite television and conference telephone links for first appearances in criminal and Family Court and for pre-trial conferences in all courts as well as all procedural motions.

Recommendation 109

The practice of filling senior management and administrative positions as well as clerks, prothonotaries and other positions within public offices by Order in Council should cease. All such positions should be filled on the basis of an open competition.

Recommendation 110

Existing court house facilities in Nova Scotia should be upgraded to conform to minimum standards of construction and design in consultation with major user groups.

Recommendation 111

The Province should assume responsibility for the provision of new court facilities for all levels of court in Nova Scotia.

Recommendation 112

During the period of reorganization of the court structure, the financial support for the court system should not be reduced, but rather savings brought about through greater efficiency should be reallocated within the system.

Recommendation 113

Once there has been sufficient experience with the operation of the new court structure, the Government of Nova Scotia should undertake a thorough review of the funding needs of the court system in order to ensure that the courts receive the proper and adequate funding required to perform their functions and that the taxpayers of Nova Scotia receive value for their investment.

APPENDIX 1

HISTORY OF NOVA SCOTIA COURTS

Mainland Nova Scotia was ceded to the British Crown in 1713 and in 1721 a General Court or Court of Judicature was established at Annapolis Royal.[1] The court was composed of the Governor and his Council, who were primarily military personnel. The General Court exercised both civil and criminal jurisdiction and sat four times a year. Six years later, in 1727, the Council issued the first commission of peace in the province, by which three persons were appointed justices of the peace to form a civil court. However, their decisions were required to be reported to the Lieutenant Governor for confirmation.[2] Little is known of the actual operations (if any) of this court. Early accounts of judicial proceedings describe criminal actions for assault, an action respecting ownership of the house and premises, and an action for slander as well as one for larceny. The first recorded evidence of a lawyer appearing before the Courts of Judicature is given as 1732 by Townsend, who also suggests that the early case records already mentioned support the contention that some kind of Courts of Judicature existed when Lord Cornwallis arrived in June of 1749.[3]

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[1] *Calnek, History of the County of Annapolis (1897) at p. 69, quoted in Townsend, "History of the Court of Chancery in Nova Scotia" (1900), Tor. Carswell at p. 5.*

[2] *Ibid.*

[3] *Townsend, at p. 6.*

The courts at Annapolis functioned until 1749 when Lord Cornwallis, authorized to constitute such Courts of Judicature as he thought necessary, established a court of general jurisdiction also known as the General Court. This court was also composed of the Governor and Council and had both civil and criminal jurisdiction. It sat twice a year and applied English law and precedent. In late 1749 or early 1750, pursuant to the report of a committee of the Council, which recommended that the Province of Nova Scotia adopt the Virginia regulations for the General Court and their County Courts as being most appropriate, the first County Court in Canada was established.[4] It was to be composed of five justices sitting monthly with jurisdiction over the whole province which, at that time, consisted of only one county, the Township of Halifax. The County Court exercised a general criminal jurisdiction, but excluding claims for outlawry or where punishment was death. Its civil jurisdiction appears to have been broad and cases could be heard by a quorum of three Justices. However, two Justices could hear claims under three pounds and only one Justice was required for claims of less than twenty shillings. There was no appeal from the decision of the one Justice.

Although the evidence is far from clear, it appears that Lord Cornwallis also constituted the first criminal court, called the General Sessions of the Peace, composed of justices of the peace and other prominent citizens appointed by the Governor. It first met in Halifax in 1750 and new Session Courts were later instituted in each county of the province as they were settled and formed. Although the geographical jurisdiction of the Sessions Court was usually coterminous with counties, some counties were divided into two sessional districts. For example, Guysborough was divided into the Districts of Guysborough and Saint Mary's, Lunenburg into Lunenburg and Chester, Shelburne into Barrington and Shelburne, Yarmouth into Yarmouth and Argyle, Digby into Digby and Clare, and Hants into Hants East and Hants West.

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[4] *Townsend, p. 19.*

Necessity also required the Governor and Council to sit as the Court of Chancery, the Court of Probate and as a Divorce Court from the beginning of court development in 1749. It is also likely that a Court of Vice Admiralty began to function shortly after Cornwallis arrived as well.

The first County Court, as such, was short lived. In 1752, local dissatisfaction with its practice and procedure resulted in it being abolished. It was replaced by a Court of Common Pleas, named and modelled upon similar inferior courts in New England. Some, but not all, of the Justices of the County Court were reappointed to the new court together with additional appointments. The Inferior Court of Common Pleas sat four times a year and it seems to have been given primarily civil jurisdiction. The criminal jurisdiction of the defunct County Court was transferred to the General Sessions of the Peace.

In 1754 the General Court was abolished and in its place a new court called the Supreme Court was installed. The Honourable Jonathan Belcher was appointed Chief Justice and until 1764 he functioned as the sole judge of the court. Apart from a change of name, little else seems to have changed except for some practice and procedure. No change of jurisdiction occurred.

As additional settlement took place in Nova Scotia, the legislature, in 1759, divided the province (excluding Cape Breton) into five counties: (1) Annapolis; (2) Kings, (including the actual Kings, Hants and Colchester); (3) Cumberland (all north of Kings County); (4) Lunenburg (comprising most of what is now called the south shore); and (5) Halifax County.[5] Up to this point, the County of Halifax had been the only recognized county in the province with undetermined boundaries. Its Justices had jurisdiction throughout peninsular Nova Scotia. The Inferior Courts of Common Pleas were multiplied to serve the new counties as were the General Court of Sessions of the Peace.

After functioning for ten years with only one judge, the Supreme Court's complement was increased to three in 1764 with the addition of two assistant judges.[6] While two judges constituted a quorum, the chief justice by his own ruling, had to be one of them. This restriction on the use of judicial personnel caused considerable inconvenience when circuits for the Supreme Court were established in 1774 with sittings held at Halifax, Horton (Kings), Annapolis and Cumberland.[7] In 1765 the legislature authorized a summary procedure to be followed in the Supreme Court and Inferior Court of Common Pleas for civil actions up to a ten-pound limit.[8] The same statute authorized two justices of the peace to hear summary actions for debt not exceeding three pounds. One justice of the peace had jurisdiction to hear civil actions not exceeding 20 shillings. This seems to have been the first attempt to set up a procedure for dealing with small debts. This was made clear in 1774 with the enactment of similar legislation. The preamble to this legislation stated: "Whereas it is thought that extending the powers of the justices of the peace in causes for the recovery of small debts may greatly contribute to the ease and relief of many poor people in this province, be it enacted", etc.[9] The advantage to the poor people presumably is in the fact that they can now appear before a justice of the peace rather than before the Supreme or County Courts.

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[5] *OHearn, J.C.C. in Halifax-Dartmouth Bridge Commission & Miller v. A.G.N.S. (1984) unreported.*

[6] *Townsend at p. 50.*

[7] *1774, 14 & 15 Geo. III cap 6.*

In 1794 the Counties of Sydney, Lunenburg, Queens and Shelburne were added as judicial districts and finally, Cape Breton in 1820. In order to overcome the restrictions imposed by Chief Justice Belcher, legislation was enacted in 1805 to allow an assistant judge to hold the Supreme Court in any other county in association with any Justice of the Court of Common Pleas or any person of the profession of the law duly commissioned by the Governor in Council.[10] This arrangement, however, was discontinued in 1809.[11] By 1816 a developing road network and stage coach lines made it possible for the Supreme Court to extend the limited circuit system to the rest of the province. An associate circuit Judge was appointed with limited power to hold court while engaged in the said circuit, but not otherwise. However, when the associate circuit Judge died in 1836 no new appointment was made to the position. In addition to the appointment of an associate circuit Judge, the entire circuit system was rearranged and extended. Circuit courts were provided for in counties where none had heretofore existed.

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[8] *5 Geo. III, c. 11.*

[9] *1774, 14 & 15, Geo. cap. XV.*

[10] *1805, 46 Geo. III, cap. 13.*

[11] *50 Geo. III, c. 15.*

No significant changes occurred in the structure or jurisdiction of the Nova Scotia courts until 1824 when the province was divided into three divisions, eastern, middle and western, and legally trained first or senior judges were appointed to head each local court (Court of Common Pleas and General Sessions of the Peace).[12] This significant development resulted from the reannexation of Cape Breton in 1820 and the dissatisfaction that former separate colony felt with a judicial system that would have merely added Cape Breton to the circuit of the Supreme Court.[13] In 1823 a petition of the magistrates and Grand Jury of Sydney, Cape Breton, asked to have a resident judge of the Supreme Court assigned there as well as a presiding judge of the Inferior Court of Common Pleas and a president of the Court of Sessions. The Nova Scotia Legislature, doubting that any Supreme Court judge could be persuaded to reside in Cape Breton, provided only for an attorney of five years' standing to be appointed Chief Justice of the Inferior Court and President of the

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[12] *4 & 5 Geo. IV, c. 38.*

[13] *See the account by Patterson, J., The Establishment of the County Court in Nova Scotia [1943], Can. B. Rev. Vol XXI, p. 394 & Murdock, B. Epitome of the Laws of Nova Scotia, Joseph Howe, Halifax, 1833, Vol. II, 432.*

Court of Sessions.[14] The appointee was to be paid an annual salary of 500 pounds yearly and to do no other work. Immediately, other county areas within the province argued for equal treatment and as a result, the system was extended to the rest of the province. Although the senior judge of each local district would now be legally trained, lay justices of the peace continued to be associated with each court.

Although the appointment of legally trained persons to the judiciary was one way of remedying the problem of unqualified personnel, "the proposal was strongly condemned by the country assemblymen who preferred procedure based on equity and common sense to strict legal forms". They also saw the proposal as "a lawyers' scheme to create offices of preferment for themselves".[15] Many citizens still thought that the Supreme Court should be made efficient enough to dispose of the civil business of the county without the existence of a concurrent jurisdiction.[16] An assessment of the effect of this change can be gleaned from the following excerpt from Murdock:

> *"There can, however, be no doubt that the gentlemen appointed to these new judgeships have put their court on an improved footing and given very general satisfaction to the country in the performance of their judicial functions. It is also admitted universally that as presidents of the General Sessions their services are most necessary and valuable in the province. Much of the statute*

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[14] *Murdock, Vol. III, p. 494.*

[15] *Beck, J. M., The Government of Nova Scotia (Tor. 1957) at p. 67.*

[16] *Murdock, Epitome, pp. 60-61 quoted in OHearn.*

> *law is carried into effect through the intervention of the Sessions in each County and an important and indispensable criminal court, which the sessions undoubtedly is, demands the aid of a professional president of legal education and experience. The name of Inferior may be well dispensed with, since these courts have been so improved, and they may be properly termed civil district courts."* [17]

The extent to which the jurisdiction of the Supreme Court and the Inferior Court of Common Pleas overlapped is also commented upon by Murdock, who notes that:

> *"the Supreme Court and Common Pleas are unlimited in other respects as to the amount of a demand, being equally entitled to jurisdiction, over the largest amounts of property or claim that may be brought in dispute before either."* [18]

In addition to the overlapping jurisdiction noted by Murdock, "there was also considerable overlapping in the use of personnel as between the sessions and the common pleas courts. The latter was staffed by senior justices from the former, the meeting times of the courts usually coincided and the same juries were employed. Thus, in most instances, the same judges and juries heard both civil and criminal cases under a different guise".

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[17] *Ibid.*

[18] *Ibid. at p. 64.*

Although there was no change in the previous jurisdiction of each court, nor in the place or times of their sittings, and lay justices of the peace still took part in the decisions of the courts, the general view seems to be that the tone and stature of the inferior courts was elevated. There was the promise of a more uniform jurisprudence being developed in the province by the legally trained chief judges, a benefit not to be lightly overlooked.

The situation in Nova Scotia with regard to court structure at this time has been summarized by one noted Nova Scotian historian in the following way:

> *"Thus a multiplicity of courts with divergent bases was thrust upon the infant colony of Nova Scotia. Prior to 1830, little progress was made to reduce them to a single hierarchical structure. What did happen was that the existing structure was regulated and extended to bring it more into conformity with provincial needs."* [19]

Although the upgrading of the inferior courts in 1824 would appear to have been most beneficial for the province, these courts were abolished in 1841 in spite of the fact that the resident judges in each of the four districts were doing the majority of the judicial work in the province. Available evidence indicates that for the year 1840 the four First Justices of the Inferior Court of Common Pleas heard a total of 38 civil cases and presided over the General Court of Sessions during 45 criminal cases.[20] The Supreme Court Judges admitted they could try, without difficulty, the cases dealt with by the Inferior Court. However, they objected strenuously to the idea of them presiding over the county business as distinguished from the judicial business of the Court of Sessions. For example, they were concerned that dealing with questions such as whether a tavern license ought to be granted to one person or another would turn them into county and local politicians and involve them in local political disputes.

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[19] *Beck, at p. 65.*

The provincial government of the day, anxious to save money, took note of the fact that 12 million people in England were served by 12 Superior Court Judges while Nova Scotia, with a population of 124,000 was served by 9.[21] The question was raised whether to reduce the number of judges sitting in each of the Supreme and County Courts or to allow the Supreme Court to take over the functions of the County Court (Inferior Court of Common Pleas). It was agreed by all that there was not enough work for both courts but it was recognized that the Supreme Court had prerogative writ powers, unlike the Inferior Court of Common Pleas.[22]

It was eventually decided that the Supreme Court should take over the work of the lower court, but, in deference to the concerns of the Supreme Court Justices, the General Court of Sessions was retained to transact county business in the form of local government functions and minor civil actions. The Sessions Court was stripped of its right to hear cases with a grand or petit jury and left with only minor criminal matters to deal with. From this time on, grand and petit juries sat only with the Supreme Court. To help accommodate the increased workload, a fourth assistant justice was added to the Supreme Court. A further change saw the jurisdiction of justices of the peace significantly increased to cover cases of debt up to ten pounds (two Justices) as well as all common assaults and batteries. Sittings of the Supreme Court throughout the province as to time and place were increased and specified in detail in statutes.

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[20] *Ibid. at p. 128, referred in Oxner, S., The Evolution of the Lower Court of Nova Scotia, "Law in a Colonial Society: The Nova Scotia Experience" (Yogis ed.), 1984, Tor. Carswell.*

[21] *Beck, The Government of Nova Scotia, at p. 128.*

[22] *Oxner, The Evolution of the Lower Courts of Nova Scotia at p. 74.*

One commentator has observed that the abolition of the County Courts in 1814 is an illustration of the tendency to merge separate courts when they develop almost identical concurrent jurisdiction. Another feasible and perhaps more likely reason for the merger was "The victory of the Reform Party reacting to the deeply ingrained Nova Scotia suspicion of and aversion to lawyers, especially those paid out of the public purse."[23] This comment refers to the fact that lawyers were appointed and paid a salary as First Justices of the Inferior Court of Common Pleas.

The official rationale for the abolition of the Inferior Courts is given in the preamble to the statute which brought this about. Whether these were, in fact, the real reasons for the change, they are worth noting.

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[23] *OHearn, J. in Halifax-Dartmouth Bridge Commission at p. 36.*

"Whereas, the present system administering justice in this Province, by means of the Supreme Court and the Inferior Courts of Common Pleas, being separate and distinct tribunals, with nearly concurrent jurisdiction in civil causes, leads to one of two mischiefs following, that is to say: Either to holding two courts in each county oftener than is necessary, whereby great loss of time is occasioned to the people, or otherwise, to the holding of the courts with the interval of a year between the terms, whereby great delay occurs in the determination of causes, attended by other injurious consequences; and whereas, it is desirable and necessary that the system should be changed and the business done by the said two separate and distinct courts be confined to one of them.

And whereas, the holding of two terms for the trial of causes for Courts of General Sessions of the Peace, for the dispatch of county and other business, except trials in each county of this province (Halifax excepted), it is sufficient for the wants of the country.

And whereas from the constitution and mode of practice of the Supreme Court a more uniform and improved administration of the law may be expected from that court than from the Inferior Court of Common Pleas under the system upon which the latter are constituted.

And whereas therefore it would be advantageous to the country that the Supreme Court should be preferred, and its operations extended, by

> *establishing two terms thereof in each county of this province, (Halifax excepted) and that the Inferior Courts of Common Pleas should be abolished, as thereby not only the inconveniences aforesaid will be remedied, as far as practicable, in the most beneficial manner, but also great savings of the expense of the judiciary will ultimately be effected."*[24]

As the legislation suggests, the two courts with almost the same jurisdiction had led to functional difficulties involving undue delay or unnecessary use of judicial personnel, a lack of jurisprudence and uniformity (in spite of legally trained chief judges) and undue expense. Whether these problems were real, perceived or just invented, the inferior courts were abolished and Nova Scotia operated without any intermediate courts between the Supreme Court and magistrates until 1874. During this time, delays increased as did general dissatisfaction with the outmoded system, but no serious attempt at remedial legislation was made. The Supreme Court continued to be made up of the chief judge and four puisne judges until after 1867. In 1870, by statute, two more judges were added.

In 1867 the *B.N.A. Act* (Section 129), retained the provincial court system intact although appointment powers were now shared with the federal government. Finally, in 1874, the present County Court system was re-established.[25] The province was divided into seven districts with a member of the Bar as County Court Judge in each one. Although the original intention had been to have a County

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[24] *1841 (4 Vic.) c. 12.*

[25] *S.N.S. 1874, c. 18.*

Court for each county, the federal minister of justice would only agree to furnish the salaries for seven judges. The County Courts took original civil and criminal jurisdiction away from the overburdened Supreme Court. It is interesting to note that the bill as introduced provided that the County Court Judges should preside over the various districts in rotation, but this was amended so as to confine each judge to his own district, but with power (just as now) to change with another judge.

In 1879 the Sessions Courts lost their administrative functions with the enactment of the *County Incorporation Act*.[26] Their judicial functions were turned over to the magistrates courts, variously termed justices of the peace or Stipendiary Magistrates, who later became Provincial Court Judges. The three level court system remained in place as it exists today. Between 1897 and 1930 there were several proposals advocating a basic alteration in the framework or jurisdiction of the Nova Scotia Courts.[27] Several were motivated not only by the unsatisfactory distribution of judicial business between the various courts but also by the lack of a genuine Court of Appeal. With regard to the latter, in 1897 the Attorney General introduced a Bill which was designed to create a Supreme Court of Appeal exorcising all the powers of the existing Supreme Court en banco. All original causes of action would be dealt with by ten other Judges and a Chief Judge composed of the existing County Court Judges and the remaining Supreme Court Judges who had not been transferred to serve on the Appeal Court. In essence, the proposal would merge the County Court with the Supreme Court. Ten judicial districts were to be established and the Judges assigned to the different districts would reside therein. As the then Attorney General explained:

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[26] *S.N.S. 1879, c. 1.*

[27] *See Beck at 296 - 297.*

> ..."*and instead of having, as existed under the present system, the Judges of the County Court trying all causes coming before them in their own section, it had been found by a great many persons that it would be better if they were to change about, and it was arranged that these Judges themselves should be able to make rules and assign circuit duties so that the same Judge should never appear twice consecutively in the same circuit, and it allowed the ten Judges to hold terms or sittings for the trial of causes of all kinds at least four times a year or oftener if they by rule of court required it owing to any excessive business that was not disposed of in the regular terms of four times a year.*
>
> *In the case of each of these Judges when not sitting at his circuit, which would only be comparatively a small portion of the year, he being a resident of his own district, would be able to discharge chamber business there because there was to be no distinction whatever in the jurisdiction of these Judges and that of a Judge of the Supreme or County Court sitting in chambers at the present time.*" *(Hon. Mr. Langley, N. S. Assembly Debates 1897, p. 141 - 142.)*

Mr. Langley explained that the advantage of the merger proposed was that:

> "*instead of barristers or solicitors being called upon practically to have a divided jurisdiction, they would have Judges who would have the jurisdiction in*

> *all matters which appertained to the administration of justice in those cases which were beyond the range of causes exclusively accorded to justices and stipendiary magistrates." (N. S. Assembly Debates, p. 141.)*

An unequal distribution of judicial work was also a cause for concern as exemplified by the comments of J. J. Powers, the Attorney General in 1913, who complained that with the possible exception of District Court #1, County Court Judges did not have enough to do and could spend their time publishing books. He therefore recommended, "Now is the time to have a shuffle of jurisdiction and if the present situation is going to remain the privilege of the Supreme and County Courts, then surely we can find some more work for them to do." [28]

In the same year, the Bar Society complained about the multiple framework of Justices, Stipendiary Magistrates, Municipal, City and County Courts, each with its jurisdiction up to $80.00 and concurrent from $20.00 upward with the Supreme Court. But, in spite of the concerns about lack of an appropriate Court of Appeal and uneven workload distribution, no legislation was enacted to correct the situation.

Some sense of the relative judicial caseload handled by the various levels of courts in Nova Scotia is provided by figures appearing in the Chronicle Herald, March 13, 1951. They suggest that in 1950, seven Provincial Magistrates were trying cases at the rate of 13,000 per year while seven Supreme Court Justices were hearing a total of 66 ordinary cases, 31 appeals and 84 divorce cases.

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[28] *As quoted in the Halifax Herald, March 26, 1913 and referred to in Beck at p. 296.*

It was 1966 before a substantial reorganization of the Supreme Court took place.[29] As of August 1, 1966 it was divided into a Trial Division consisting of the chief justice of the trial division and five other judges, and an Appeal Division consisting of the chief justice of Nova Scotia, who is the chief justice of that division, and two other judges. An additional appeal judge was added in 1973 and another in 1977 when two additional trial judges were also added. Insofar as the County Courts were concerned, in 1971 an additional judge was provided for District #1, Halifax County. Since an amendment to the *Judicature Act* in 1972, County Court Judges have been appointed local judges of the trial division of the Supreme Court and as such have extensive powers.[30] Their jurisdiction as County Court Judges has also been gradually widened and now includes civil actions up to $50,000. At the present time the Supreme Court consists of 21 judges, including the chief justices, 14 at trial and 7 on appeal, as well as such judges as become supernumerary judges under the *Judges Act of Canada*.[31]

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[29] *Judicature Amendment Act, S.N.S. 1962, c. 18, in force 1966.*

[30] *S.N.S., 1972, c. 2, s. 23.*

[31] *R.S.C., 1985, C. J-1.*

Other Courts

Court of Chancery

This court was established in 1749 with the Governor serving personally as Chancellor and presiding over the court. At first he was assisted by the councillors and later by Masters of Chancery who were trained lawyers. The first Master of the Rolls was appointed in 1825 at which time the Governor ceased to preside over the court. He continued, however, to hear appeals from decisions of the Master, assisted by Judges of the Supreme Court. Public dissatisfaction with "the abominable, heartbreaking, pocket picking system" exemplified by the Chancery Court[32] led to legislative attempts to restrict its powers. Much was transferred to the Supreme Court or made concurrent. In 1855 the Chancery Court was abolished somewhat prematurely and its functions transferred to the Supreme Court. However, a partial reinstatement occurred in 1864 with the appointment of a Judge in Equity whose status appears to have been that of an assistant justice. Final and ultimate fusion of the Chancery Court with the Supreme Court occurred in 1884 by virtue of the *Judicature Act* coming into operation.

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[32] *Acadian Recorder, September 22, 1832, Beck p. 130.*

Court of Probate

Initially, the authority for proving wills and administering their provisions was exercised by the Governor functioning in his capacity as Ordinary. While in England the power to grant letters of administration and the probate of wills was exercised by the ecclesiastical courts, the absence of such courts in Nova Scotia required a different procedure to be followed. "Even before the First Assembly", Governor Cornwallis "had delegated part of his authority in this capacity to a Surrogate General."[33]

In 1758 the authority was given to a Judge of Probate but although probate "was actually granted by the Surrogate-General and the Judges in Probate, they were delegates of the Governor who, in his capacity as Ordinary, was theoretically responsible for their acts up to 1842."[34] Between 1758 and 1842 Probate Courts were established in all counties and larger districts. In 1842 the legislature placed the organization and functioning of the Probate Courts on a statutory basis. They were made subject to the rules and orders of the Judges of the Supreme Court and the Master of the Rolls.

In 1897 a significant change was made in an attempt to simplify procedures and reduce costs. The functions of the then existing Judges of Probate were assumed by the Registrars of Probate and the County Court Judges. Registrars were to deal with uncontested probate matters while County Court Judges dealt with contested cases. They also heard appeals from Registrars' decisions. Under current legislation the County Court Judge is ex officio the Judge of Probate in each county within his district.[35]

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[33] *Beck, p. 64.*

[34] *Beck, p. 130.*

At present, the majority of judicial functions in the Probate Court are performed by the Registrar of Probate. The County Court Judge only exercises jurisdiction when there are disputed claims against an estate or where proof of the will in solemn form is required. Although a County Court Judge has jurisdiction to pass upon the executors' and administrators' final accounts, the jurisdiction is not exercised in Nova Scotia.

Marriage and Divorce

In 1749 in the absence of ecclesiastical courts, the Governor and Council constituted themselves into a Court of Marriage and Divorce whenever they received a divorce petition. It was not until 1757 that a Court of Divorce and Matrimonial Causes was formally established, although it too consisted of the Governor and his Council. In 1841 the Governor was empowered to appoint the Chief Justice, the Master of the Rolls or any other Supreme Court Justice to be the Vice President of the Court with power to sit with two or more members of the Executive Council.

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[35] *Probate Act, R.S.N.S. 1967, C. 238, S. 1(b).*

In 1866 the legal power to try divorce actions was vested solely in the Vice President who, as Judge in Equity, functioned under the title of Judge Ordinary of the Court for Divorce and Matrimonial Causes. In 1948, as a result of a veritable deluge of divorce cases, all Justices of the Supreme Court were named Judges of the Court for Divorce and Matrimonial Causes and the title Judge Ordinary was dropped. In addition to providing the necessary increase in judicial manpower, the change also had the added advantage of allowing divorces to be heard on circuit. In 1962 the County Court Judges (except for the County of Halifax) were similarly designated. The court became redundant when the federal *Divorce Act* of 1968 gave exclusive jurisdiction in divorce to the Trial Division of the Supreme Court.

Court of Vice Admiralty

This was initially an imperial court established in 1749. Prior to 1801 it was always presided over by a judge appointed from the United Kingdom. After this date, cases were tried by a court consisting of the Vice Admiralty Judge, the Governor, the Provincial Secretary and senior naval officers. In 1867 admiralty matters were placed within the federal jurisdiction and until 1891, Canadian Courts in Admiralty existed. In that year the Canadian Courts of Admiralty were abolished and jurisdiction conferred upon the Exchequer Court of Canada to be exercised by local or district judges in each province.

What does History tell us?

One constant theme reiterated by those concerned with the administration of justice in Nova Scotia over the centuries has been the concern to provide speedy justice to all parts of the province as cheaply as possible. Given the restrictions on transportation and communication facilities, this was no easy task. We should also remember that the system worked for many years with a minimum of legally trained people in the system. 1824 is therefore an important date in this regard because of the policy decision to infuse legally trained people into the system.

Our historical evolution also reveals an ongoing problem with what is considered to be the appropriate civil and criminal jurisdiction for different levels of courts. Overlapping jurisdiction, distrust of lawyers, lack of trained legal personnel, primitive transportation and communication facilities all contributed to the difficulties experienced.

A second problem that is revealed in our historical account is the unevenness of workload as between different levels of courts. Whether this was due to poorly trained judicial personnel, primitive transportation and communication facilities or inappropriate overlapping and concurrent jurisdiction is difficult to tell.

Although the County Court was twice abolished, the need for such an intermediate court manifested itself and it was reinstated. In the period between 1841 and 1874, when there was no County Court in Nova Scotia, it was made clear beyond doubt that a centralized Superior Court with limited personnel resources and only two circuits per year was not sufficient to handle the business and other affairs of the province. This is not to say that 100 years later a decentralized Superior Court with sufficient personnel and much improved transportation and communication technology could not provide the needed judicial service. As Judge Peter O'Hearn has observed, the urge to merge becomes stronger when two separate court systems develop almost identical jurisdictional powers. Although this historical account of the development of our Nova Scotia court structure reveals clear ambivalence of approach with regard to the need for local County Courts, the experience does not clearly indicate that a single superior court with sufficient personnel who would be resident within various districts could not adequately service the public today. Advanced communication and transportation facilities overcome to a large extent some of the problems faced by our predecessors while the advantages of resident full-service judges should overcome most of the difficulties experienced with the earlier experiment with a single superior court.

APPENDIX 2

SURVEY OF COMMUNITY CONCERNS REPORT TO THE N. S. COURT STRUCTURE TASK FORCE SEPTEMBER 10, 1990, BY THE P.L.E. SOCIETY

I EXECUTIVE SUMMARY

Purpose of survey
A survey of community concerns was undertaken by the Public Legal Education Society in order to provide the Nova Scotia Court Structure Task Force with some initial input from the public about its perception of the efficiency and effectiveness of our current system of courts.

Who was surveyed
The survey was sent to 230 community groups and agencies, including professional associations, transition houses, counselling agencies, Chambers of Commerce, Helplines, child welfare agencies, groups representing Blacks and Natives, and agencies dealing with immigration, women, the disabled, human rights and justice. The intent was to tap into the broadest possible lay experience of the Nova Scotia court system. These groups were not expected to have first hand experience in the courts, but were asked to respond on the basis of their knowledge of the experiences or opinions of their group's members or clients.

Response rate
Twenty-four percent of the 230 groups contacted responded to the survey. This is a low/average response rate, and not amenable to detailed statistical analysis. However, the rate is high enough to provide a useful overview of the issues relating to Family and Criminal Courts, which were the courts most frequently addressed by respondents.

Principal conclusions
A number of recurring themes and suggestions for improvements emerge from a review of the responses. Most of these concern the Family and Criminal Courts:

1. **A need for education and information**
   - . the public needs more information on the legal system
   - . there is a need for plain language throughout the system
   - . officials within the system - judges, crown prosecutors, lawyers and court staff - need education and training in various areas, such as:
     - - the effect of social conditions in which many of the people involved with the legal system find themselves (poverty, violence, unemployment, etc.)
     - - changing family structure and dynamics with special emphasis on the long term effects of family violence and sexual abuse;
     - - sensitivity and cultural training with respect to women, natives, blacks, the disabled and minorities generally.

2. **A need for changes in the system**
   - matters proceeding through the courts take too long
   - women and minorities must be represented among officials of the system
   - alternatives to the court system should be attempted in situations where a negotiated resolution would have a better chance of long term success, such as some family matters

3. **A need for a better and different allocation of resources**
   - more resources need to be allocated to the legal system
   - reduction in caseloads of legal aid lawyers
   - greater victim support and use of child advocates in court
   - provision of interim protection for families which are subject to abuse as matters wind their way through the system
   - separate waiting rooms for parties and witnesses
   - special assistance for the disabled
   - effective mandatory treatment programs for offenders

Other Matters

Suggestions were made with respect to the format of Task Force Public Meetings, and the Schedules contain a summary of responses regarding Social Assistance Appeal Boards and County and Supreme Courts, and responses which did not relate to a particular level of court or administrative tribunal.

APPENDIX 3

SUPREME COURT

CIVIL CASES BY AMOUNT CLAIMED

1 MONTH - SEPTEMBER, 1990

157 CASES

Under $3,000	11	7%
$3,000 - $5,000	25	15.9%
$5,000 - $10,000	39	24.8%
$10,000 - $20,000	23	14.6%
$20,000 - $50,000	20	12.7%
$50,000 - $100,000	21	13.3%
$100,000 - $200,000	10	6.3%
$200,000 - $500,000	4	2.5%
$500,000 - 1 Million	1	.08%
Over 1 Million	3	1.9%

Claims under $ 10,000 = 47.7% of cases
Claims under $ 20,000 = 62.4% of cases
Claims under $ 50,000 = 75.1% of cases
Claims under $100,000 = 88.4% of cases
Claims under $500,000 = 97.1% of cases

COUNTY COURT

CIVIL CASES BY AMOUNT CLAIMED

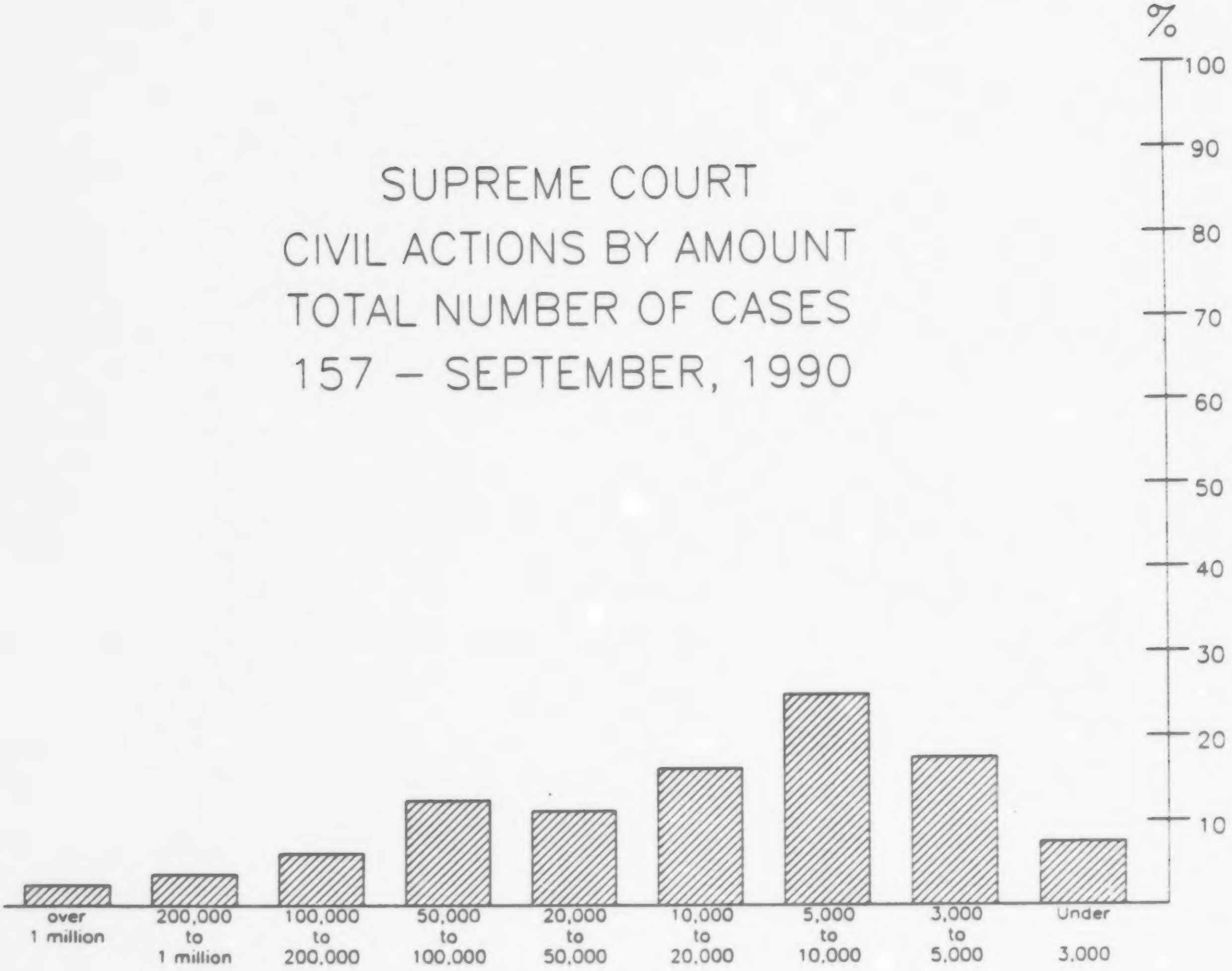
1 MONTH - SEPTEMBER, 1990

257 CASES

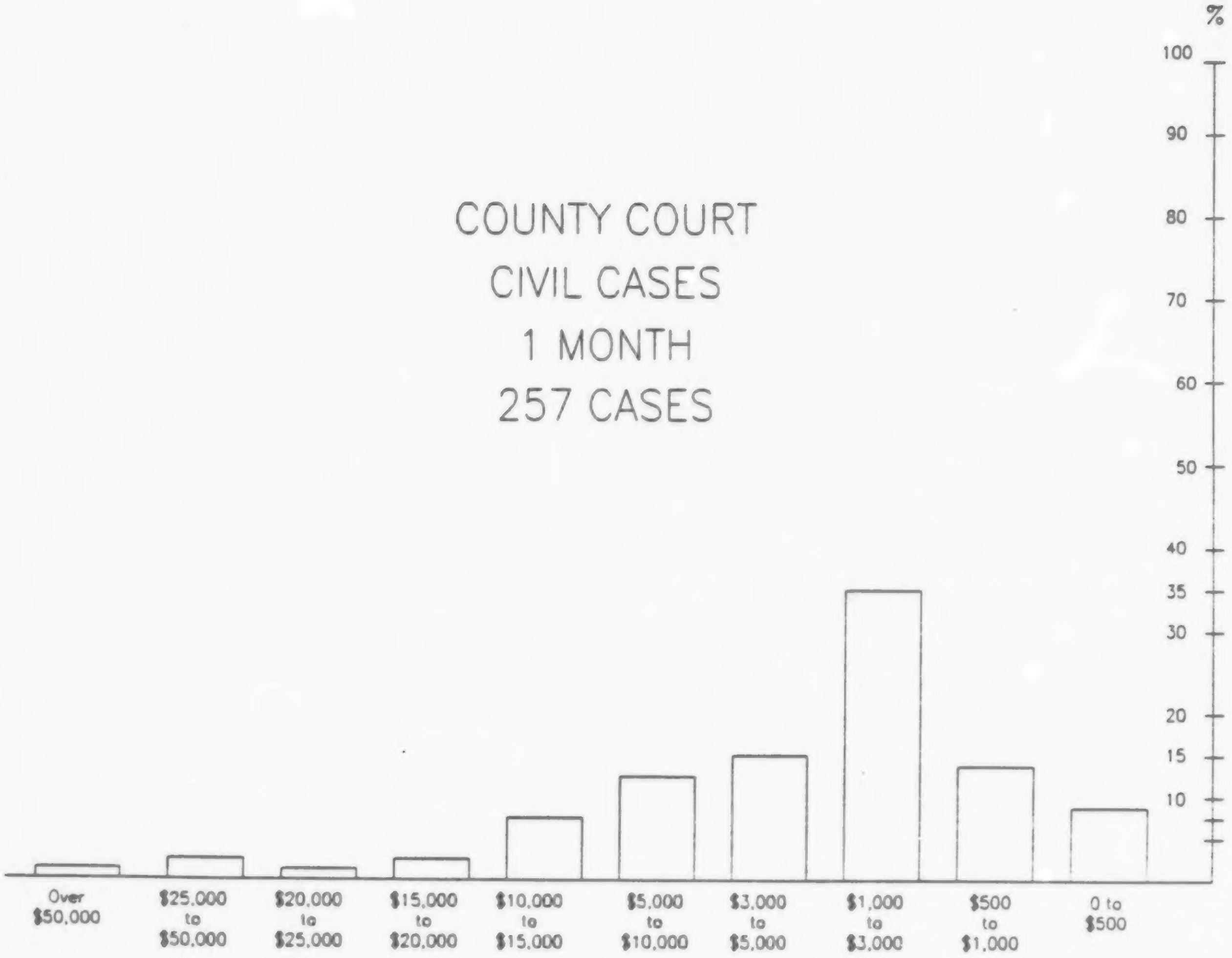
$0 - $500	25	9.6%	58.1%
$500 - $1,000	35	13.7%	
$1,000 - $3,000	90	34.8%	
$3,000 - $5,000	40	15.5%	
$5,000 - $10,000	32	12.4%	
$10,000 - $15,000	18	6.9%	
$15,000 - $20,000	5	1.9%	
$20,000 - $25,000	4	1.5%	
$25,000 - $50,000	5	1.9%	
Over $50,000	3	1.1%	
		99.3%	

Claims under $15,000 account for 93% of the civil claims in the County Court.

Claims under $5,000 account for 73.6% of the claims.



SUPREME COURT
CIVIL ACTIONS BY AMOUNT
TOTAL NUMBER OF CASES
157 – SEPTEMBER, 1990



COUNTY COURT
CIVIL CASES
1 MONTH
257 CASES

APPENDIX 4

LOCAL JUDGES OF THE TRIAL DIVISION

Jurisdiction and powers of local judge

25 (1) A judge of the county court who is appointed by the Governor General in Council to be a local judge of the Trial Division of the Court may at the request of the Chief Justice of Nova Scotia or the Chief Justice of the Trial Division exercise all the jurisdiction, powers and authority now belonging to or exercised by a judge of the Trial Division.

Name and privileges of local judge

(2) In exercising the jurisdiction or powers or performing the functions of a judge of the Trial Division, a judge of the county court shall be known and styled as a local judge of the Trial Division of the Supreme Court of Nova Scotia and for such purposes a judge of the county court shall possess, exercise and enjoy all the privileges of a judge of the Trial Division.

Further jurisdiction

(3) In addition to the jurisdiction, powers and authority referred to in subsection (1), it is declared that the jurisdiction of a judge of the county court as a local judge of the Trial Division extends to the exercising of all such powers and authority and the performing of all such acts and the transacting of all such business as may be exercised, performed or transacted by the Trial Division or any judge thereof in respect of the following proceedings and matters:

(a) the *Divorce Act* (Canada);

(b) any matter arising under an enactment of the Province if jurisdiction under the enactment is assigned to a local judge of the Trial Division by the enactment or by the Lieutenant Governor in Council;

(c) any matter that by the Rules is assigned or is or may be referred to a local judge of the Trial Division.

Form of request under subsection (1)

(4) A request made pursuant to subsection (1) shall be made in the form of a requisition signed by the Chief Justice of Nova Scotia or the Chief Justice of the Trial Division.

Copy of requisition as evidence

(5) A duplicate copy of the requisition shall be filed with the Prothonotary at Halifax and shall be conclusive evidence of the authority of the local judge of the Trial Division to act under this Section.

Reference to master substituted

(6) A reference in any enactment to a master of the Supreme Court is a reference to a local judge of the Trial Division. R.S., c. 240, s. 25.

RULE 36

LOCAL JUDGES

36.01 A local judge may exercise all such powers and authority, perform all such acts and transact all such business as may be exercised, performed or transacted by a judge of the Trial Division sitting in chambers.

36.02 A local judge may hear and determine,

(a) applications under Section 38A of the Act;

(b) applications under the Matrimonial Property Act; and

(c) applications for interim or interlocutory injunctions.

36.03 Where all the parties consent in writing, a local judge may hear and deal with any application, including the trial of the proceeding or of any issue arising in it, and whether the application was commenced under r. 9.02, 9.03 or 9.04, or is interlocutory, and the local judge shall possess the powers of the court for hearing, determining and disposing of the application, including the trial.

36.04 A local judge may refer any application or any question arising therein or on a trial, to a judge of the Trial Division sitting either in chambers or in court, or to the Appeal Division, and the application or question shall be disposed of as the judge or Appeal Division thinks just. [Amend. 10/11/80]

APPENDIX 5

POPULATION FIGURES - as of 1986
LAWYERS - as of 1989

1. **Cape Breton Region - Population 166,116**

   Served by 115 lawyers = 1/1,444
   and 2 County Court judges = 1/83,058

   County Court judges sit primarily in Sydney and occasionally in Baddeck and Arichat. Suggested sittings of the court:

   (1) Sydney
   (2) Port Hawkesbury
   (3) Baddeck as a satellite

   Supreme Court sits in Arichat, Port Hood, Baddeck and Sydney.

   Sittings:

   Criminal - October, February, April and June
   Civil - September, November, March and May

2. **Halifax and Halifax County - Population 306,418**

   Served by 799 lawyers = 1/383
   and 4 County Court judges = 1/76,604
   and 15 Supreme Court judges = 1/20,428

3. **Western Region - Population 207,935**

   Served by 168 lawyers = 1/1,237
   and 2 2/3 County Court judges = 1/78,171

   3 in the region now - Digby, Kentville and Lunenburg = 1/69,311

4. Central Region - Population 179,222

Served by 138 lawyers = 1/1,298
and 1 2/3 County Court judges = 1/107,965

2 in the region now - New Glasgow and Antigonish = 1/89,611

TOTAL population to be served - 859,691

Total number of Superior Court judges available:

Supreme 15
County 11
〉 26 = 1 Superior Court judge for every 33,065

POPULATION CENTRES WITHIN REGIONS

1. Cape Breton

Sydney	28,115	(72)
Glace Bay	20,467	(7)
New Waterford	8,326	(3)
Sydney Mines	8,063	(3)
North Sydney	7,472	(7)
	72,443	
Port Hawkesbury	3,869	(13)

Currently 2 judges resident in Sydney.

2. Halifax and Halifax County

Halifax	113,577	(647)
Dartmouth	65,243	(109)
Bedford	8,010	(21)

Currently 4 judges resident in Halifax.

3. Western Region

	Yarmouth	7,617	(19)
	Bridgewater	6,617	(30)
*	Kentville	5,108	(36)
	Windsor	3,665	(12)
	Liverpool	3,295	(5)
	Wolfville	3,277	(5)

Currently County Court judges resident in Kentville, Digby and Lunenburg.

4. Central Region

Truro	12,124	(54)
New Glasgow	10,022	(25)
Amherst	9,671	(21)
Antigonish	5,291	(17)
Stellarton	5,259	(6)
Springhill	4,712	(1)
Pictou	4,413	(6)

Currently 2 judges resident in New Glasgow and Antigonish.

DISTANCES

Sydney to Port Hawkesbury	104 miles
Port Hawkesbury to Cheticamp	80 miles
Amherst to New Glasgow	107 miles
Amherst to Mulgrave	177 miles
Amherst to Truro	70 miles
Yarmouth to Wolfville	153 miles
Yarmouth to Windsor	169 miles
Yarmouth to Shelburne	61 miles
Yarmouth to Middleton	115 miles
Yarmouth to Lunenburg	143 miles
Yarmouth to Kentville	146 miles
Yarmouth to Digby	69 miles
Yarmouth to Bridgewater	128 miles
Yarmouth to Annapolis Royal	87 miles

PRESENT RESIDENTIAL JUDGES

Halifax County - 4 =			1/76,604
Cape Breton - 2 Sydney =			1/83,058
Central - 2:	1 New Glasgow 1 Antigonish	=	1/89,611
Western - 3:	1 Digby 1 Kentville 1 Lunenburg	=	1/69,311
	—		
	11		

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NUMBER OF INSURED LAWYERS BY AREA

AREA	NUMBER	AREA	NUMBER
Halifax	647	Sydney Mines	3
Dartmouth	109	New Waterford	3
Sydney	72	Barrington	3
Truro	54	New Germany	3
Kentville	36	Tantallon	3
Bridgewater	30	Mahone Bay	2
New Glasgow	25	Westville	2
Amherst	21	Arichat	2
Bedford	21	Greenwood	2
Yarmouth	19	Shubenacadie	2
Antigonish	17	Coldbrook	1
Lr. Sackville	13	Bras d'Or	1
Port Hawkesbury	13	Canning	1
Windsor	12	Chester Basin	1
Digby	8	Meteghan	1
Glace Bay	7	Guysborough	1
Shelburne	7	Cheticamp	1
North Sydney	7	Church Point	1
Stellarton	6	Hubbards	1
Annapolis Royal	6	Oxford	1
Lunenburg	6	River Philip	1
Pictou	6	Springhill	1
Middleton	6	Waverly	1
Chester	6	Sherbrooke	1
Liverpool	5	Margaree Valley	1
Baddeck	5		
Wolfville	5	TOTAL (Province)	1,220
Berwick	4		
Enfield	4		
Bridgetown	3	Out of Province	22+

+ This number includes four (4) lawyers who do not pay Nova Scotia liability insurance but have purchased extra territorial coverage in another province that entitles them to practise in Nova Scotia.

1986 POPULATION FIGURES
(Nova Scotia Municipal Units)
TABLE 1

MUNICIPAL UNIT	1986 Population (Final)
(Cities)	
DARMOUTH	65,243
HALIFAX	113,577
SYDNEY	28,115
Total Cities	206,935
(Towns)	
AMHERST	9,671
ANNAPOLIS ROYAL	631
ANTIGONISH	5,291
BEDFORD	8,010
BERWICK	2,058
BRIDGETOWN	1,118
BRIDGEWATER	6,617
CANSO	1,285
CLARK'S HARBOUR	1,098
DIGBY	2,525
DOMINION	2,754
GLACE BAY	20,467
HANTSPORT	1,357
KENTVILLE	5,208
LIVERPOOL	3,295
LOCKEPORT	917
LOUISBOURG	1,355
LUNENBURG	2,972
MAHONE BAY	1,093
MIDDLETON	1,772
MULGRAVE	1,051
NEW GLASGOW	10,022
NEW WATERFORD	8,326
NORTH SYDNEY	7,472
OXFORD	1,376
PARRSBORO	1,729
PICTOU	4,413
PORT HAWKESBURY	3,869
SHELBURNE	2,312
SPRINGHILL	4,712
STELLARTON	5,259
STEWIACKE	1,265
SYDNEY MINES	8,063
TRENTON	3,083
TRURO	12,124
WESTVILLE	4,271
WINDSOR	3,665
WOLFVILLE	3,277
YARMOUTH	7,617
Total Towns	173,400

	1986 Population (Final)
(Rurals)	
ANNAPOLIS	20,068
ANTIGONISH	13,485
ARGYLE	9,055
BARRINGTON	7,824
CAPE BRETON	47,073
CHESTER	10,605
CLARE	9,740
COLCHESTER	31,704
CUMBERLAND	17,331
DIGBY	9,587
GUYSBOROUGH	7,294
HALIFAX	119,588
HANTS, EAST	18,181
HANTS, WEST	13,345
INVERNESS	18,077
KINGS	42,732
LUNENBURG	25,196
PICTOU	22,724
QUEENS	9,830
RICHMOND	11,841
SHELBURNE	5,365
ST. MARY'S	3,091
VICTORIA	8,704
YARMOUTH	10,401
Total Rurals	492,841
Total Province	873,176

APPENDIX 6

GEOGRAPHICAL DISTRIBUTION OF JUSTICES OF THE PEACE IN NOVA SCOTIA

Annapolis County	16
Antigonish County	7
Cape Breton County	36
Colchester County	19
Cumberland County	17
Digby County	12
Guysborough County	13
Halifax County	111
Hants County	14
Inverness County	17
Kings County	33
Lunenburg County	16
Pictou County	21
Queens County	2
Richmond County	5
Shelburne County	9
Victoria County	8
Yarmouth County	13
TOTAL	**369**

APPENDIX 7

PROVINCIAL COURT STATISTICS (1989)

Area	Criminal Code	Other Federal	Provincial Statistics	Municipal Bylaws
Amherst	875	126	(6) 2,017	51
Yarmouth	1,034	(3) 313	1,269	8
Port Hawkesbury	581	128	1,333	0
Digby	757	(5) 271	802	8
New Glasgow	1,048	116	1,417	31
Antigonish	686	77	1,190	1
Pictou	171	42	253	8
Truro	1,346	131	717	(2) 163
Sydney	2,388	(4) 274	(4) 3,839	69
Bridgewater	869	88	1,626	15
Kentville	2,257	(6) 196	(5) 2,541	21
Liverpool	210	42	370	(3) 138
Halifax	394	(1) 1,779	749	37
City Court	2,351	103	4,326	(1) 3,449
	2,745	1,882	(1) 5,075	3,486
Bedford	1,123	116	(3) 4,090	45
Dartmouth	2,798	(2) 668	(2) 4,556	68
	18,888	4,470	31,095	7,598

APPENDIX 8

SMALL CLAIMS COURT

RESULTS INDICATORS FOR 1990 (April - November)

	No. of Cases	No. of Cases Settled Prior to Court Sitting	Actual No. of Cases Heard by Adj.	No. of No Show Cases	No. of Cases Adj. by Request	No. of Cases Adj. for Other Reasons	No. of Appeals Filed	Actual Court Time
Annapolis	188	58	96	12	21	1	0	21.00
Antigonish	216	32	98	10	74	2	0	32.50
Cape Breton	1,138	142	620	58	208	110	21	126.00
Colchester	683	119	335	34	193	2	1	105.50
Cumberland	332	84	159	18	50	21	3	69.75
Digby	214	42	112	19	22	21	0	19.75
Guysborough	36	7	22	1	5	1	0	3.25
Halifax	1,846	356	996	278	156	76	44	394.00
Hants	263	51	124	20	32	36	1	42.25
Inverness (Port Hawkes.)	138	39	58	2	32	7	1	18.75
Inverness (Port Hood)	117	34	49	4	27	3	1	10.50
Kings	513	74	316	23	40	51	2	101.50
Lunenburg (Town)	100	11	57	6	25	1	1	17.75
Lunenburg (Bridgewater)	410	81	242	9	77	1	5	86.25
Pictou	395	68	190	25	86	26	1	59.00
Queens	149	23	97	7	20	3	0	24.75
Richmond	87	16	48	0	13	10	0	19.75
Shelburne	266	53	146	0	47	19	0	39.25
Victoria	52	13	34	0	0	11	1	7.00
Yarmouth	385	67	210	18	81	9	0	46.50
TOTAL	7,528	1,370	4,009	544	1,209	411	82	1,245.00

APPENDIX 9

EXECUTIVE COUNCIL

NOVA SCOTIA

Certified to be a true copy of an Order of his Honour the
Lieutenant Governor of Nova Scotia in Council made the
11th day of September, A. D. , 1990

90-1087

The Governor in Council on the report and recommendation of the Minister of Community Services dated the 8th day of August, A.D., 1990, pursuant to Section 12 of Chapter 159 of the Revised Statutes of Nova Scotia, 1989, the Family Court Act, is pleased to approve amendments to the Family Court Rules as set forth in Schedule "A" attached to and forming part of the report and recommendation.

HFG Stevens

H. F. G. STEVENS, Q.C.,
CLERK OF THE EXECUTIVE COUNCIL.

SCHEDULE "A"

Amendments to the Family Court Rules made pursuant to Section 12 of Chapter 159 of the Revised Statutes of Nova Scotia, 1989, the Family Court Act.

1) Clause (b) of Subsection (2) of Rule 6.02 is amended by adding to the list of letters destinctive of the office where Family Court proceedings are commenced the following

L	Little Brook
BG	Barrington

2) Rule 6 is amended by adding immediately following Rule 6.02 thereof the following:

6.03 (1) Any document may be delivered to and filed with the Court by telephone facsimile transmission as provided in this rule.

(2) A document may be served by a party on a solicitor of record in accordance with subrule (3).

(3) A document which is delivered by telephone facsimile transmission shall include a cover page indicating:

(a) the sender's name, address, and telephone facsimile number;

(b) the date and time of transmission;

(c) the names of the parties in the proceeding and the file number, if one has been assigned;

(d) the total number of pages transmitted, including the cover page;

(e) the telephone facsimile number from which the document is transmitted;

(f) the name and telephone number of a person to contact in the event of transmission problems.

(4) Subject to subrule (5) filing shall be deemed complete at the time the telephone facsimile transmission is received by the Court and the filed facsimile shall have the same force and effect as the original.

(5) Documents filed by telephone facsimile shall only be received on weekdays, excluding holidays, between 9:00 a.m. and 4:00 p.m.. Within five days after the Court has received the transmission, the person filing the document shall deliver the original signed document to the Court together with a filing fee and transmission fee as prescribed from time to time. Upon the filing of the original document it shall be clearly marked on the face "Sent By Telephone Facsimile Transmission", giving date and time of such transmission.

(6) Upon failure to comply with any of the requirements of this rule, the Court may make such orders as are just, including but not limited to, an order striking pleadings or parts thereof, an order removing the facsimile document from the file, staying further proceedings until compliance is complete, or dismissing the proceeding or any part thereof.

(7) Any certified document sent by the Court by telephone facsimile transmission in accordance with subrule (3) shall be deemed to be certified original document not withstanding the seal of the Court is not impressed thereon. Such transmitted document may be further certified at the local office of the Court by its proper officer.

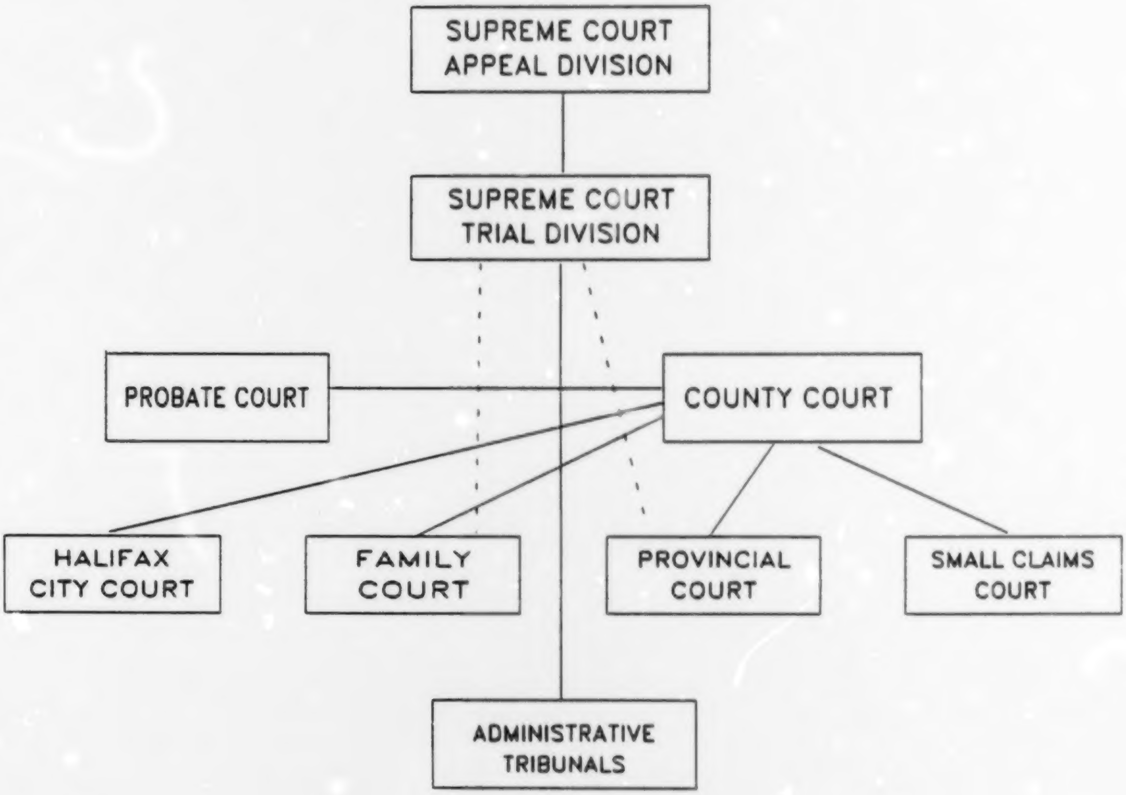
3) Form 5 and Form CSA-13 are amending by deleting from each of the said forms the paragraph commencing with the words "These Are Therefore To Command" and ending with the words "of the Family Court" and substituting the following paragraph therefor in each of the said forms:

> THESE ARE THEREFORE TO COMMAND you in Her Majesty's name, forthwith to apprehend the said and to bring before the judge presiding at the Family Court at Nova Scotia, to answer to the said Application and to be further dealt with according to law provided, however, if after 3:30 o'clock in the afternoon or on a weekend, or on a holiday this warrant is executed, remand the person herein named to a provincial correctional facility, to be arraigned at the first session of the Family Court.

Approved by the Lieutenant Governor of Nova Scotia in Council on the
17 day of September 19 91
CLERK OF THE EXECUTIVE COUNCIL
91-1007

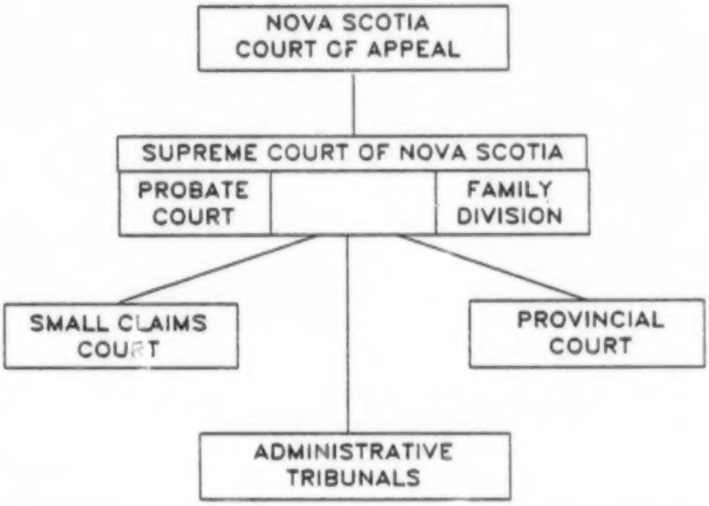
APPENDIX 10

PRESENT COURT STRUCTURE


SUPREME COURT APPEAL DIVISION
SUPREME COURT TRIAL DIVISION
PROBATE COURT
COUNTY COURT
HALIFAX CITY COURT
FAMILY COURT
PROVINCIAL COURT
SMALL CLAIMS COURT
ADMINISTRATIVE TRIBUNALS

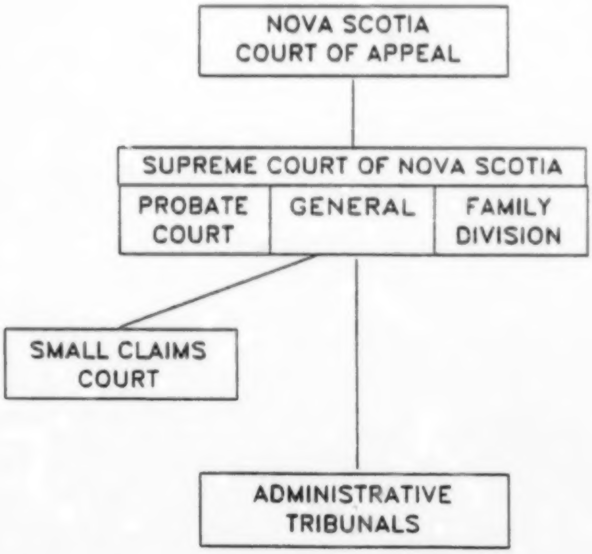
PROPOSED COURT STRUCTURE

PHASE I


NOVA SCOTIA COURT OF APPEAL
SUPREME COURT OF NOVA SCOTIA
PROBATE COURT
FAMILY DIVISION
SMALL CLAIMS COURT
PROVINCIAL COURT
ADMINISTRATIVE TRIBUNALS

PROPOSED COURT STRUCTURE

PHASE II (CONDITIONAL)


NOVA SCOTIA COURT OF APPEAL
SUPREME COURT OF NOVA SCOTIA
PROBATE COURT
GENERAL
FAMILY DIVISION
SMALL CLAIMS COURT
ADMINISTRATIVE TRIBUNALS

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PUBLIC HEARING SUBMISSIONS

Bridgewater	Mr. MacDonald on behalf of the Lunenburg County Bar
Middleton	Bonnie Bryson, Deputy Mayor, Town of Middleton
Middleton	Bruce Gillis, Q. C.
Middleton	John Hughes - Vice Chair, Middleton Police Commission
Middleton	Ken Cook, Chief of Police
Yarmouth	Paul Scovil on behalf of the Yarmouth County Bar Society
Sydney	Sakej Henderson on behalf of the Union of Nova Scotia Indians
Sydney	Keith Anderson
New Glasgow	Low Income Women's Group Pictou County Women's Centre Tearmann Transition House Pictou County Crisis Intervention Centre Transition House of Nova Scotia New Leaf Naomi Society of Antigonish
Truro	Children's Aid Society
Halifax	Victims of Violence - Bert Dickson Barbara Johnson Service for Sexual Assault Victims Nova Scotia Association of Social Workers Society for the Deaf & Hard of Hearing Bryony House

SUBMISSIONS

1. Jean Swantko
2. Barbara M. Johnson
3. Pictou County Crisis Intervention Association
4. Family Service of Eastern Nova Scotia
5. Metro Community Law Clinic, 2830 Agricola Street, Halifax
6. Tearmann Society for Battered Women (1989)
7. Phyllis McLean
8. Hon. Judge Charles E. Haliburton
9. Hon. Chief Justice Lorne Clarke
10. Hon. Chief Justice Constance Glube
11. Hon. Chief Judge Ian M. Palmeter
12. Hon. Judge N. Robert Anderson on behalf of the Association of County Court Judges in Nova Scotia
13. Nova Scotia Provincial Judges' Association
14. His Honour Judge Paul Niedermayer
15. Hon. Judges Murray J. Ryan and Simon J. MacDonald
16. Hon. Mr. Justice Grant
17. Hon. Judge Hugh MacDonnell
18. A. Martin Smith, Q. C., Prothonotary
19. His Honour Chief Judge W. Marshall Black
20. Her Honour Judge Sandra E. Oxner
21. Canadian Bar Association

22. Cape Breton Barristers' Society
23. Western Counties Bar Society
24. Colchester County Bar Association
25. Cumberland Barristers' Association
26. City of Dartmouth Barristers
27. Digby County Barristers' Society
28. Kings County Bar
29. Lunenburg County Barristers' Association
30. Strait Area Bar Association
31. Pictou County Barristers' Society
32. Antigonish Barristers
33. Annapolis County Bar Society
34. Children's Aid - Ms. Marilyn R. Peers
35. Transition House Association - Ms. Judy Hughes
36. Dalhousie Legal Aid - Jeanne E. Foy
37. Nova Scotia Association for Family Rights - Mr. Ken McBrine
38. Nova Scotia Legal Aid - Del Atwood and Malcolm Jeffcock
39. G. W. Sealy
40. John Merrick
41. Donald S. Taylor
42. Ian Holloway
43. K. J. Kenney
44. Michael K. Power
45. Veryon Haysom

46. Gillian S. Allen

47. Borden L. Conrad, Q. C.

48. D. Fraser MacFadyen

49. Ian G. Darrach

50. Robert L. Barnes

51. Linda D. Garber

52. Nova Scotia Barristers' Society - re Judicial Councils

53. Professor Andrew Heard - re Judicial Councils

54. Family Court Judges of Nova Scotia

55. His Honour Chief Judge William J. Atton

56. Donald Murphy, Q. C., City Manager

57. C. J. Backman, Administrator, Halifax City Court

58. Nova Scotia Public Legal Education c/o Thelma Costello

59. Coverdale Court Work Services - K. Jennex and M. Rodger

60. Stephen Jenner c/o Eastern Shore Safe House Association

61. James Walsh

62. Hon. Mr. Justice Richard

63. Walter Thompson, Chair, Residential Tenancies Board

DISCUSSIONS

1. Hon. Mr. Justice Zuber
2. Former Mr. Justice Esty
3. Hon. Mr. Justice Matthews
4. Hon. Mr. Justice Richard
5. Mr. Hughes (British Columbia)
6. Hon. Chief Justice Clarke
7. Hon. Chief Justice Glube
8. Hon. Chief Judge Ian M. Palmeter
9. His Honour Chief Judge W. Marshall Black
10. His Honour Chief Judge William J. Atton and former Chief Judge Harry W. How

QUESTIONNAIRE RESPONSES
LETTERS FROM MEMBERS OF THE NOVA SCOTIA BARRISTERS' SOCIETY

1. Frank G. Gillis
2. Eric LeDrew
3. James C. MacIntosh
4. David I. Jones
5. Richard L. Weldon

and eight unsigned questionnaires

COURTS AND REGISTRIES VISITED

1. Windsor - Ms. Blanche Hendy, Deputy Prothonotary
2. Kentville - Mrs. Yvonne Bezanson, Prothonotary
3. Annapolis Royal - Mrs. Patricia A. Connell, Prothonotary
4. Digby - Mr. J. R. Patrick McIntyre, Prothonotary
5. Yarmouth - Ms. Diane Hamilton, Prothonotary
6. Shelburne - Mrs. Carol Lynn Strang, Prothonotary
7. Liverpool - Mr. Robert William Brogan, Prothonotary
8. Bridgewater - Mr. David Bolivar, Prothonotary
9. Sherbrooke - Miss Margaret MacIntosh, Deputy Prothonotary
10. Guysborough - Mrs. Lorraine Ehler, Prothonotary
11. Antigonish - Mr. Gerald MacDonald, Prothonotary
12. Port Hood - Ms. Lynn Van de Ven, Deputy Prothonotary
13. Sydney - Mr. W. A. Bungay, Prothonotary
14. Baddeck - Mr. Winston Cameron, Prothonotary
15. Halifax - Mr. A. Martin Smith, Q. C., Prothonotary

SMALL CLAIMS COURT
QUESTIONNAIRE RESPONSES

1. Steve Harder
2. Gordon F. Demone, New Ross Credit
3. Gilbert N. Langille
4. Miller Brothers Excavation Limited
5. Darren Mann, Avco Finance
6. Cooks Oil Company Limited
7. Frank Hoyt, Keltic Collections
8. Wayne J. MacMillan
9. Byron G. Balcom
10. Yorke Tutty
11. Hugh R. McLeod
12. W. Bruce Gillis, Q. C.
13. Donald S. Taylor for Walker & Taylor